United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

76-1458

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United States Court of Appeals For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

ALBERT ANZALONE,

Appellant.

On Appeal From The United States District Court For The Eastern District Of New York

Appellant's Appendix

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UNITED STATES COURT OF APPEALS
FILED
NOV 29 1976
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SECOND CIRCUIT

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INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

ALBERT ANZALONE,
ANTHONY VIVELO,
NICOLAS LOMBARDI, and
ROBERT BARBIERI,

Defendants.

- - - - - - - - - - - - - - - - - - - X

Cr. 75 CR 751

INDICTMENT

Cr. No. 75 CR 751
(T. 18, U.S.C., §241, §2, §1623; T. 42, U.S.C., §3631)

10-14-75

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between the 6th day of April 1972 and the 22nd day of April 1972, within the Eastern District of New York, the defendants ALBERT ANZALONE, ANTHONY VIVELO, NICOLAS LOMBARDI, and ROBERT BARBIERI, together with Gerald Maddalone, herein named as a co-conspirator but not as a defendant, knowingly and wilfully did conspire to injure, oppress, threaten, and intimidate Alberto Charles, a black citizen of the United States, in the free exercise and enjoyment of, and because of his having so exercised, his right secured to him by federal law to rent, lease, and purchase real property without discrimination because of race and color.

OVERT ACTS

In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, the said defendants and co-conspirator committed the following overt acts within the Eastern District of New York:

1. On or about the early morning of April 7, 1972 the defendants ALBERT ANZALONE, ANTHONY VIVELO, NICOLAS LOMBARDI and ROBERT BARBIERI participated in the shooting and breaking of the windows of the house located at 351 Milton Avenue, Staten Island, New York.

2. On or about the early morning of April 7, 1972 the defendants ALBERT ANZALONE, ANTHONY VIVELO, NICOLAS LOMBARDI, ROBERT BARBIERI, and the co-conspirator Gerald Maddalone met at Vivelo's house. They discussed various ways to prevent Alberto Charles and his family (hereinafter "the Charles family") from moving into the house located at 351 Milton Avenue, Staten Island, New York, including among others burning the house down.

3. On or about the early morning of April 7, 1972 the co-conspirator Gerald Maddalone splashed paint on the front door of the house located at 351 Milton Avenue, Staten Island, New York.

4. On or about April 10, 1972 the defendants ALBERT ANZALONE, ANTHONY VIVELO, NICOLAS LOMBARDI, ROBERT BARBIERI, and the co-conspirator Gerald Maddalone participated in an effort to raise money for a down payment so that a white family could purchase the house located at 351 Milton Avenue, Staten Island, New York and thereby prevent the Charles family from moving into the said house.

5. On or about the night of April 12, 1972 or the early morning of April 13, 1972 the house located at 351 Milton Avenue, Staten Island, New York was flooded with water, causing extensive water damage.

6. At approximately 1:15 - 1:30 A.M. on the early morning of April 22, 1972, the defendant ANTHONY VIVELO walked from his house to the house of the defendant ALBERT ANZALONE.

7. On or about the early morning of April 22, 1972, arson was committed on the house located at 351 Milton Avenue, Staten Island, New York. (Title 18, United States Code, Section 241.)

COUNT TWO

On or about the 7th day of April 1972, within the Eastern District of New York, the defendants ALBERT ANZALONE, ANTHONY VIVOLO, NICOLAS LOMBARDI, and ROBERT BARBIERI, by force, that is, the shooting and breaking of windows, did knowingly and wilfully injure, intimidate, and interfere with, and attempt to injure, intimidate, and interfere with Alberto Charles because of his race and color and because he was and had been renting and contracting and negotiating for the rental and purchase of the house located at 351 Milton Avenue, Staten Island, New York. (Title 42, United States Code, Section 3631; Title 18, United States Code, Section 2.)

COUNTS THREE THROUGH TEN

Introduction:

1. Counts three through ten are directly related to, based on, and arise out of the same series of acts and transactions constituting the civil rights offenses charged in this indictment.

2. At all times material hereto, a grand jury of the United States duly impaneled and sworn in the United States District Court for the Eastern District of New York was conducting an investigation to determine whether there had been committed in the Eastern District of New York violations of the civil rights laws of the United States involving discrimination with respect to the rental and purchase by the Charles family of a house located at 351 Milton Avenue, Staten Island, New York.

3. It was material to the aforesaid grand jury investigation to ascertain, among other things:

a. The identity and actions of any person or persons who participated in or had knowledge of any act of vandalism at the said house;

b. The identity and actions of any person or persons who participated in or had knowledge of the shooting and breaking of the windows of the said house;

c. The identity and actions of any person or persons who participated in or had knowledge of an effort to raise money for a down payment so that a white family could purchase the said house, and thereby prevent the Charles family from moving into the said house;

d. The actions on the early morning of April 22, 1972 shortly before the fire at the said house of any person or persons who lived near the said house; and

e. The identity and actions of any person or persons who participated in or had knowledge of the arson at the said house.

COUNT THREE

On or about the 4th day of March 1975, within the Eastern District of New York, the defendant NICOLAS LOMBARDI, while under oath as a witness in the aforesaid proceeding before a grand jury of the United States, did knowingly make false material declarations as underscored below:

Q. Were you ever involved in any act of vandalism against the premises at 351 Milton Avenue?

A. No.

Q. Specifically, did you ever shoot a CO-2 operated pellet or BB type gun at or in the direction of the windows at 351 Milton Avenue?

A. No.

Q. Did you ever shoot at the front windows of 351 Milton Avenue and thereby break the panes of glass in those windows?

A. No.

Q. Were you ever present with anyone else who shot a firearm at the windows at 351 Milton Avenue?

A. No.

Q. When I used the word "firearm" in that last question, I use it in a broad sense like the question which I previously gave.

With that definition in mind, I ask you again, were you ever present when any other person shot a firearm towards the premises of 351 Milton Avenue?

A. No.

Q. Were you ever present when any damage whatsoever was done upon the front windows at 351 Milton Avenue?

A. No.

Q. Do you know the identity of anyone who inflicted any type of damage or committed any act of vandalism on the premises at 351 Milton Avenue?

A. No.

(Title 18, United States Code, Section 1623.)

COUNT FOUR

On or about the 29th day of April 1975, within the Eastern District of New York, the defendant ALBERT ANZALONE, while under oath as a witness in the aforesaid proceeding before a grand jury of the United States, did knowingly make false material declarations as underscored below:

Q. Were you ever involved in any act of vandalism against the premises at

351 Milton Avenue?

A. No, sir.

Q. Specifically, did you ever shoot a BB or pellet type gun at or in the direction of the front windows at 351 Milton Avenue?

A. No, sir.

Q. Did you ever shoot at the front windows of 351 Milton Avenue and thereby break panes of glass in these windows?

A. No, sir.

Q. Were you ever present when any person shot any kind of gun toward the windows of 351 Milton Avenue?

A. No, sir.

Q. Were you ever present when any damage was inflicted upon the front windows of 351 Milton Avenue?

A. No, sir.

Q. Do you know the identity of anyone who inflicted any type of damage or committed any act of vandalism on the premises of 351 Milton Avenue?

A. No, sir.

(Title 18, United States Code, Section 1623.)

COUNT FIVE

On or about the 29th day of April 1975, within the Eastern District of New York, the defendant ANTHONY VIVELO, while under oath as a witness in the aforesaid proceeding before a grand jury of the United States, did knowingly make false material declarations as underscored below:

Q. Were you ever involved in any act of vandalism against the premises of 351 Milton Avenue?

A. No.

. . .

Q. Specifically, did you ever shoot a BB or pellet type gun at/or in the front windows at 351 Milton Avenue?

A. No.

Q. Did you ever shoot any type gun at the front windows of 351 Milton Avenue?

A. No.

Q. Were you ever present when any other person shot any type of gun at the front windows of 351 Milton Avenue?

A. No.

Q. Were you ever present when any damage was inflicted upon the front windows at 351 Milton Avenue breaking the glass?

A. No.

Q. Do you know the identity of anyone who inflicted any type of damage or committed any type of vandalism at the premises of 351 Milton Avenue?

A. No.

(Title 18, United States Code, Section 1623.)

COUNT SIX

On or about the 29th day of April 1975, within the Eastern District of New York, the defendant ROBERT BARBIERI, while under oath as a witness in the aforesaid proceeding before a grand jury of the United States, did knowingly make false material declarations as underscored below:

Q. Were you ever involved in any act of vandalism against the premises at 351 Milton Avenue?

A. No.

Q. Were you ever present when any act of vandalism against those premises was committed?

A. No.

. . .

Q. Were you ever present when any damage was inflicted upon the front windows of 351 Milton Avenue?

A. No.

(Title 18, United States Code, Section 1623.)

COUNT SEVEN

On or about the 4th day of March 1975, within the Eastern District of New York, the defendant NICOLAS LOMBARDI, while under oath as a witness in the aforesaid proceeding before a grand jury of the United States, did knowingly make false material declarations as underscored below:

Q. Were you involved in any way in the solicitation of money with respect to the premises at 351 Milton Avenue prior to the fire?

A. No.

. . .

Q. Did you, yourself, maintain a list of names of persons who agreed to contribute money in connection with 351 Milton Avenue?

A. No.

Q. Did you, yourself, maintain any kind of list of names with respect to 351 Milton Avenue?

A. No.

Q. Did you ever see any such list?

A. No.

Q. Did you ever hear about any such list?

A. No.

(Title 18, United States Code, Section 1623.)

COUNT EIGHT

On or about the 29th day of April 1975, within the Eastern District of New York, the defendant ROBERT BARBIERI, while under oath as a witness in the aforesaid proceeding before a grand jury of the United States, did knowingly make false material declarations as underscored below:

R

Q. There is evidence before this Grand Jury that shortly after the incident at the real estate office on that Sunday that an attempt was made by neighbors in the area to raise money, enough money for a down payment on the house so that a white family could purchase it and in this way prevent the black family from moving in.

There was some talk of it. Everybody contributed $50. Each family contributed $50. That way they could raise enough money to make the down payment and then a family, white family could purchase the house using this money as a down payment and thereby prevent the black family from moving into the house.

Did you ever learn prior to the fire of any solicitation of money along those lines?

A. They were not for money as far as I know. People were going from house to house to form a civic type or solidarity organization in order not to sell the house so no one would sell their house. I know that, yes.

Q. That was an attempt so nobody else would sell their house?

A. I think that is what it was. I did see people going from house to house. I didn't see any money being exchanged or promised or of any attempt to stop the black family with money.

Q. My question is: Did you ever learn that there was any solicitation with respect to 351 Milton Avenue prior to the time of the fire?

A. Of money, no except from the FBI or different investigators did say that.

Q. You do not have any personal knowledge with respect to the solicitation of money, with respect to 351 Milton Avenue?

A. No, I again -- I said there were people going to each house speaking to individuals, taking their names in order to form a civic association. That's what he told me at least. I wasn't there. It was to form a solidarity type association so no one would move and it would prevent block busting.

Q. When did that take place?

A. Sometime in 1972. I don't know.

Q. Was it prior to the fire?

A. Oh, yes.

Q. Were you involved in any way in the solicitation of money with respect to 351 Milton Avenue?

A. I just said I didn't know of any money being solicited, so therefore I am not involved in it.

. . .

Q. Shortly after the fire, did there come a time when you were questioned by fire marshalls?

A. Yes.

. . .

Q. During this conversation with the fire marshalls, did you give them the names of any person you believed to be involved in the soliciting of money?

A. No.

Q. Did you tell the fire marshalls that any person participated in the solicitation of money to your knowledge?

A. No.

Q. Did you tell any fire marshalls that Tony Tortora was a person who had been involved in the solicitation of money?

A. Probably not. Probably told them the same thing I said about Tony before. He seemed to have some type of connection with the real estate office and I said about the community center thing, I might have said that to them or something similar to that.

Q. Did you tell any fire marshall that Tony Tortora was a person who was involved in the solicitation of money with respect to 351 Milton Avenue?

A. No.

Q. You are sure of that?

A. Am I sure about that?

See occasionally you can say things you don't mean. I could have said it but I didn't know anything about the money. I could have said.

. . .

Q. Other than that Tony Tortora, did you tell the fire marshalls, did you give the fire marshalls the name of any other person who participated in the solicitation of money with respect to 351 Milton Avenue?

A. No. If I had given them names, then I would have given them -- now there is nothing to hide.

Q. Did you tell the fire marshall that there was a neighborhood group which was trying to collect money with respect to 351 Milton Avenue?

A. No, I said vaguely, I remember saying there was a neighborhood group trying to get together to form some type of organization. It could be the same thing.

Q. You did not say anything about any neighborhood group which was trying to collect money from the neighbors to use as a down payment to purchase the premises at 351 Milton Avenue?

A. Could you read that back please?

(Whereupon the pending question was read back.)

A. No, no to that question. But I did remember, just remembered it now that Tony Tortora again had said something about his sister might buy the house but she would need more money. That's the only time I heard money being spoken about. Maybe I told them that Tony Tortora's sister was going to buy the house.

It confused me because it wasn't up for sale. It was sold.

Q. You might have mentioned something about money in connection with Anthony Tortora?

A. It's possible -- not a collection from house to house.

. . .

Q. Putting aside again Tony Tortora, did you tell the fire marshalls the name of any other person who you indicated was involved in the solicitation of money with respect to 351 Milton Avenue?

A. No.

Q. Did you tell the fire marshalls that any persons had come to your house trying to collect money with respect to 351 Milton Avenue?

A. No.

. . .

Q. Prior to the interview with the fire marshalls, did you have any knowledge whatsoever with respect to the solicitation of money with respect to the purchase of 351 Milton Avenue?

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A. I can't answer that with a yes or no. I can answer with an explanation.

The explanation is that they might be confusing the fire marshalls or myself, might be confusing two different things. That would be the forming of taking names from people, getting their names in order to form some kind of solidarity or community association to prevent any form of block busting -- but to my knowledge I don't remember any money being spoken of except when Tony Tortora or somebody told me about that.

Maybe I didn't get it directly from him his sister was going to purchase the house but she -- she didn't have the money. If she doesn't have the money, where is it going to come from?

Q. Prior to the interview with the fire marshalls, did you have any knowledge with respect to raising money for a down payment to purchase 351 Milton Avenue?

A. No, except the way I just explained it to you in the previous question.

Q. Other than that, your answer is no?

A. Yes, the answer is no.

Q. Other than that you had no such knowledge?

A. Right.

Q. Were you, yourself, a part of any such group?

A. Which group?

Q. The group that went from house to house.

A. I was in the car when a group did go from house to house. I guess you could say I was part of it.

Q. That is in connection with what you were talking about before, forming a group which would agree not to sell?

A. Let me explain it. This would be easier.

There was, like I said in the previous statement, people going from house to house speaking to each neighbor and asking

them to form a civic association. I assume that's, that is what they were asking them because I was not at the door. I don't go to peoples' houses. I was in the street at the time or sidewalk, yes.

The houses are very close. If you notice each house is only twenty-five feet wide. Each person has twenty-five feet of property, so you could be standing in front of your house yet within one hundred feet of you are six houses. Very tight area. Very tight.

So when you say "in the area" when I was standing in front of a place, that's six houses you are in front of, not one.

Q. As far as you are concerned, as far as you believe the other people were making attempts to do what?

A. I thought they were trying to form some kind of an association to prevent other families from selling to minorities in order to cause a run on houses which would lower the value of homes, which would be block busting. This is what I thought they were doing. Maybe I was mistaken.

Now I have gotten from you in the questions and from the FBI -- it happens there was money being collected or solicited. I don't know anything about that.

Q. You did not know about any money being raised?

A. Right.

Q. Or any attempts with respect to 351 Milton Avenue?

A. Other than the statement I gave you a few minutes ago explaining the answer.

(Title 18, United States Code, Section 1623.)

COUNT NINE

On or about the 29th day of April 1975, within the Eastern District of New York, the defendant ALBERT ANZALONE, while under oath as a witness in the aforesaid proceeding before a grand jury of the United States, did knowingly make false material declarations as underscored below:

Q. Mr. Anzalone, I would now like to direct your attention to your activities on the afternoon and evening of April 21, 22 of 1972.

That was the night of the fire at 351 Milton Avenue.

Where were you that afternoon?

A. I would say working.

Q. Did there come a time when you came home?

A. Yes, the normal time is six, seven o'clock around that time.

. . .

Q. What would be the last time you were outside that evening?

A. I don't know. It is so long ago. It could be eleven o'clock, 11:30. It could be even about ten o'clock. I don't know.

Q. Were you outside after midnight that night?

A. Outside -- no, I went to the door after midnight to let someone in, yes.

Q. Who was that?

A. Anthony Vivelo.

Q. Mr. Vivelo came over to your house that evening?

A. Sure.

Q. Do you recall what time that was?

A. I would say it would have to be maybe a little before 12:30, a little after 12:30 roughly, that time.

Q. Did Mr. Vivelo work that night?

A. From four to twelve.

. . .

Q. That night you say he came over to your house about what time?

A. I have to say about 12:30. I don't know the exact time. Five minutes, one way or the other.

Q. Approximately 12:30?

A. Approximately, yes.

Q. What happened when he came over?

A. What happened?

Q. Yes.

A. He knocked on my door, he needed a key to get into his house. He couldn't get in. He didn't have no key.

Q. Would you explain that to the Grand Jury?

A. He came to my door, knocked on my door, said that he couldn't get into his house because he had no key. He asked to use my telephone. I let him use my telephone and I also gave him a cup of coffee. That's what happened.

Q. He came in, used your telephone to call his wife?

A. Yes, to wake her up.

Q. To tell her to unlock the door?

A. Yes.

Q. Then he had a cup of coffee?

A. Yes, sir.

. . .

Q. In any event, to the best of your recollection at this time he came over at 12:30 and left by one o'clock?

A. Yes.

. . .

Q. After he left your house, called his wife, had a cup of coffee which you say is about one o'clock, after that time prior to the fire which took place at two o'clock or shortly thereafter, in that intervening time did Mr. Vivelo come over to your house again?

A. No.

Q. You are sure about that?

A. Positive.

(Title 18, United States Code, Section 1623.)

COUNT TEN

On or about the 29th day of April 1975, within the Eastern District of New York, the defendant ANTHONY VIVELO, while under oath as a witness in the aforesaid proceeding before a grand jury of the United States, did knowingly make false material declarations as underscored below:

Q. Mr. Vivelo, I would now like to direct your attention to the evening of the fire at 351 Milton Avenue which has been placed in the early morning of April 22nd.

. . .

Q. What were your hours of duty on that day?

. . .

A. I did four to twelve.

Q. In other words, you worked from 4 p.m. to 12 midnight?

A. Yes.

Q. Where were you located at that time?

A. Coney Island.

Q. How long does it take you to get from Coney Island to your home on Staten Island at that hour of the night when you worked a four to twelve shift?

A. Somewhere from twenty minutes.

. . .

Q. When you are working the four to twelve shift, when will you usually get home?

A. 12:30.

. . .

Q. Do you recall what time you arrived home on the night of the fire?

A. I imagine the same time.

Q. That would be about 12:30?

A. Yes.

Q. What did you do when you got home?

A. I tried to get into my house.

Q. What happened?

A. I was locked out.

Q. You did not have the keys with you?

A. I didn't have the keys, no.

. . .

Q. What did you do that night when the door was locked?

A. Banged on the door.

Q. Then what happened?

A. Then I went across the street to Mr. Anzalone's house and asked if I could use his phone and I called my wife.

. . .

Q. Did you call your wife?

A. Yes.

Q. Did you wake her up?

A. I told her to open the door.

Q. Did she say she would?

A. Yes.

Q. Then what happened?

A. Then I went home and took my dog out.

Q. Do you recall approximately what time it was that you left the Anzalone's house?

A. A few minutes. I don't know how long it took.

Q. You got home about 12:30. What time would it have been you left?

A. Maybe a quarter to -- I am only guessing. I wasn't clocking myself.

Q. Approximately a quarter to one?

A. Yes.

. . .

Q. Would it refresh your recollection any if I told you that when you were interviewed by the police detective, shortly after, about a week after the fire that you told him that you then let your dog out the back door, let the dog run loose?

I'm sorry.

That you let the dog out the door, back door and you walked to the front of the house with the dog, let the dog run loose, walked to the rear of the house and entered by the back and the dog returned two or three minutes later and you let the dog in the back door?

A. Yes.

Q. Is that about what happened?

A. That's what I generally do.

Q. In other words, you do not walk around a lot?

A. I stay by our house and let the dog run, right.

Q. Then what did you do?

A. I went to bed.

Q. If you got home about 12:30 and it was about a quarter of one when you left Anzalone's, when was it when you finally let out the dog and went to bed?

A. Approximately one o'clock I guess, 1:15.

Q. At any time after you left Mr. Anzalone's house and went back to your house, I assume at that point in time your wife had unlocked the door when you left Mr. Anzalone's house about a quarter of one and went back to your house?

It was unlocked?

A. Yes.

Q. Was that the front or back door?

A. I don't recall.

Q. In any event you went into the house and that is when you got the dog?

A. Yes.

Q. At any point from that point on prior to the fire that night, did you ever go back to Mr. Anzalone's house?

A. Not that I recall.

Q. Did you at any time walk across the street from your side of the street over to Mr. Anzalone's house and approached his front door?

A. I don't recall if I did.

It wouldn't be unusual for me to go back and forth to talk to him. I don't recall exactly what I did that night, but I am in and out of his house three times a day.

Q. Would you have recalled it at the time you were interviewed shortly after the fire?

A. Yes.

Q. And if you did not say anything about going back to his house at that time would it be fair to state that you did not go back to his house at that time?

A. Yes.

Q. Do you have any recollection now of going back to his house that night?

A. No.

Q. To the best of your recollection did you go back to his house that night?

A. No.

. . .

Q. At about 1:20 or 1:30 that night did you go walking from your house across the street to Mr. Anzalone's house for any reason whatsoever?

A. I don't recall if I did.

. . .

Q. I am directing your attention now, Mr. Vivelo, to the best of your recollection. I want the best of your recollection as to what you did that night after you walked the dog.

A. To the best of my recollection I did not go back to his house.

(Title 18, United States Code, Section 1623.)

A TRUE BILL.

FOREMAN

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

STENO TRANS PRELIMINARY MOTION TO DISMISS
DATED MAY 3, 1976

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
JUL 9 1976
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- : 75-CR-751

ALBERT ANZALONE, ANTHONY VIVELO, NICHOLAS LOMBARDI, ROBERT BARBIERI, :

Defendants. :

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United States Courthouse
Brooklyn, New York

May 3, 1976
10:00 o'clock A.M.

B e f o r e :

HONORABLE EDWARD R. NEAHER, U.S.D.J.

I Hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

Gene Rudolph

Official Court Reporter
U. S. District Court

GENE RUDOLPH
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: RONALD DE PETRIS, ESQ.
Assistant U.S. Attorney

BARRY AGULNICK, ESQ.
Attorney for Defendant Anzalone

WILLIAM GOGEL, ESQ.
Attorney for Defendant Vivelo

STEPHEN FLAMHAFT, ESQ.
Attorney for Defendant Lombardi

ANTHONY J. CRECCA, ESQ.
-and-
DENNIS J. PETERSON, ESQ.
Attorneys for Defendant Barbieri

THE CLERK: Criminal case for trial, United States of America versus Albert Anzalone, Anthony Vivelo, Nicholas Lombardi and Robert Barbieri.

MR. DE PETRIS: Ready for the Government, your Honor.

THE COURT: Let's see.

Mr. Peterson?

MR. PETERSON: Yes, your Honor.

THE COURT: I see I've just received a motion from you. Have you been served with this?

MR. PETERSON: I apologize for the late hour of the motion.

THE COURT: Have you been served with a copy, Mr. DePetris?

MR. DE PETRIS: Yes, your Honor, I have.

THE COURT: I haven't had a chance to read it. Let me read it.

Mr. DePetris, have you had a chance to read these respective motions?

MR. DE PETRIS: Yes, I have, your Honor.

THE COURT: And what is the Government's position with respect to the severance aspects?

MR. DE PETRIS: The motions should be denied, your Honor, and if your Honor wishes me to, I can state the basis for that.

THE COURT: All right.

MR. DE PETRIS: Because I did give some thought to this matter prior to handing up the indictments in the case. First of all, generally, with the -- where you have perjury in substantive counts and there is a commonalty of proof involved, as there clearly is in this case, your Honor can see from the indictment that the perjury counts all relate to the defense with respect to one or more of the overt acts of the conspiracy counts so there is clearly a commonalty of proof.

The case law is clear that where there is such a commonalty of proof between perjury and substantive counts, generally they should be cited -- they should be tried together. I can give your Honor several cases which I have Xeroxed here, with respect to that matter.

In the Second Circuit, there is United States versus Carson, 464 F 2d, 424 and United States versus Sweig, 441 F 2d, 114 at 118 and 119. The Carson case was 424 at Page 436. The Gill case, United States versus Gill, in the Seventh Circuit, 490 F 2d, 233 at 239. In the Seventh Circuit, United States versus Pacente, which is an en banc decision in the Seventh Circuit, 503 F 2d, 543 at

545 to 548. And also in the Seventh Circuit, United States versus Braasch, 505 F 2d, 139 at Page 150.

In those cases they stand for the proposition where there is a commonalty of proof as there is in this case, that the cases should be tried together.

There is one additional element that comes into this case and that is the fact that the use immunity question , the fact that the defendants testified before the Grand Jury. Under use immunity. Under the language of the statute itself, it probably is not crystal clear in a situation like this, because this is a case for perjury and giving of false statements, although it has also additional counts in the indictment as to the substantive counts.

However, I think the case law is clear in this situation, a limiting instruction can take care of whatever problem there is in that regard.

In other words, your Honor would instruct the jury to consider the testimony of the defendants before the Grand Jury, only on the perjury counts.

In the case of United States versus Pacente, which I previously cited to your Honor, the District Court in that case gave a limiting instruction to

to the jury, to that effect. only consider the Grand Jury testimony on the perjury counts, not on the substantive counts.

The Court of Appeals in that case upheld that. The same in the Braasch case, which I previously cited to your Honor, and the Gill case, which I previously cited to your Honor.

In all those cases, the District had given a limiting instruction to the jury, only consider the Grand Jury testimony on the perjury counts. The District Court upheld that limiting instruction as being valid and the jury being able to follow it.

Now, in this case, particularly, the jury would be able to follow the limiting instruction because it is not as if the defendants went before the Grand Jury and made incriminating admissions. If they had admitted their -- having committed some of these acts before the Grand Jury, we'd be in a different position and then I think I would probably agree that the jury could not follow the limiting instruction, where the jury was hearing admissions by the defendant before the Grand Jury as having committed crimes.

But in this case, the -- we have no such

admissions. The defendants denied it before the Grand Jury. We think we can make an analogy to the Bruton line of cases, the kind -- the line of cases following Bruton which held that the -- distinguished Bruton on the ground in those particular cases there was no devastating risk that the jury couldn't follow the limiting instruction, because -- because of the fact that there was not powerfully incriminating statements.

The Catanzarro case is one such example, 404 F 2d, 296, Second Circuit case, and that's one of many cases where they have held that the jury could follow limiting instructions.

In this case we can see by the -- if we look to the specific facts of the case, we can see clearly that that would be the case. Counts 3 through 6, the perjury counts 3 through 6, are denials by the defendants that they participated in the shooting and breaking of the windows at 351 Milton Avenue.

Count 2 charges that they did this and their plea of not guilty to Count 2 in and of itself constitutes a denial that they committed those acts. So, it is obviously no way the jury is going to use that testimony in denying those acts against

the defendants. There is no prejudice in that regard.

Counts 7 and 8 are -- relate to the denials about having participated in the over act relating to the effort to raise money for a down payment to purchase the house at 351 Milton Avenue, to prevent the black family from moving in.

The plea of guilty -- the plea of not guilty to Count 1 at least implicitly constitutes a denial as to having been involved in those acts.

So, therefore,there is no prejudice and no likelihood that the jury cannot follow the limiting instruction which the Court would give.

As to Counts 9 and 10, those perjury counts relate to the denial that Mr. -- the defendant Vivelc walked over to the defendant Anzalone's house at about 1:15 to 1:30 in the morning of that day.

Again, that's an overt act in the indictment.

In Count 1, again there is a plea of not guilty to that count and furthermore, the Government intends to introduce in evidence on its direct case an interview of Mr. Vivelo and Mr. Anzalone by the fire marshal and the police detective, where they inquired of the defendants as to their whereabouts

and actions on the night of the fire.

And at that point in time, based on those interviews, the jury will have before it a denial in effect of being before -- of being out on the street at that hour.

So, from the Government's direct case, the jury will have heard a denial in that regard, so there was no risk that it will add anything to it, once they hear the denial before the Grand Jury.

Additionally we have an additional -- one additional reason for denying the motion in this case. That is the case of United States versus Traumunti, Second Circuit, 500 F 2d, 1334 which if your Honor recalls, I cited to your Honor on the question of immunity, the use immunity when we had the pre-trial motion to dismiss the indictment. And in that case the Court held the defendant, where he's given use immunity and goes before the Grand Jury, and testifies -- gives false and not incriminatory testimony, that testimony is not compelled within the meaning of the statute.

It is not to be given the protection -- the Fifth Amendment protection because the purpose of giving one use immunity was to have him go before the Grand Jury and testify truthfully and then the

incriminatory truth could not be used against him.

In this case, where we have the denials, there is no prohibition against its use under the Traumunti case and under the Traumunti case I could -- I would submit that I could introduce the Grand Jury testimony in my direct case on the Civil Rights trial as false exculpatory testimony by the defendants and in fact in the Traumunti case, the Second Circuit upheld the introduction of the false and not incriminatory Grand Jury use immunity Grand Jury testimony, either as impeaching the defendants or as simial acts, a similar act of lying before the Grand Jury.

So, that's an additional reason for denying the motion and finally, I would have -- should bring to the Court's attention the provisions of Rule 12B5C and F, which would require that, absent good cause, these motions to have been made back in January or February, whenever it was that the Court -- the date the Court set for motions.

I would not raise the untimeliness issue if there was any real question of prejudice here but as I see it, there is no substantial question of prejudice and therefore I would submit to the Court that that's another ground for denying.

There is no prejudice, no good cause for the motion not to have been brought before and I would submit, in addition to that, that if we do get into the trial and showhow prejudice does appear during the trial, at that time the matter can be resolved appropriately.

Certainly at this point in time, there is no reason for granting the motions made at this late date and in light of the substantial case law to the contrary, to the thrust of their motions.

I have the case Xeroxed, if your Honor wishes to see any of the cases.

THE COURT: Well, I'd be glad to have them, if you wish to let me have those copies.

Who wishes to speak first on behalf of the defense in this connection, Mr. Peterson?

MR. PETERSON: Fine, Judge, first I do apologize to the Court for the late hour of the motion. It should have been presented earlier. It was primarily an oversight.

However, in accordance with Rule 12, we have the right to submit any time prior to the beginning of trial.

In essence, Judge, and very succinctly, it would seem to me that it would be highly impossible

for any juror to consider testimony in reference to the perjury counts and not to consider it in reference to the substantive counts of perjury -- of conspiracy and the Human Rights allegation.

Your Honor, we have one case, Drew versus the United States, 331 F2d, 85. I think that case hits this right on the nail. Your Honor, I merely am asking for an election of counsel. It would not at all prejudice the Government to sever and to elect, in the interest of fundamental fairness, Judge.

THE COURT: Well, I must say, though, that I am somewhat persuaded by Mr. DePetris' point, that if we were talking about admissions of some kind, it would be a different situation. Here, as I see it, and having read the testimony to the extent outlined in the indictment, "I must confess that I see nothing on its face which would constitute any admission of inculpation by these defendants."

MR. AGULNICK: If your Honor pleases, as far as the defendant Anzalone is concerned, I think Mr. DePetris has stated this morning that he intends on his direct case to use false exculpatory explanations for certain events.

THE COURT: Let me put it this way: When he

says, false, of course he is going to -- as I understand it, he is going to offer testimony of that your -- by the way, what is your name?

MR. AGULNICK: My name is Agulnick, Barry Agulnick.

THE COURT: Yes. As I understand it, he will put on testimony, perhaps through the fire marshal, I suppose, about statements made by your client, which will be statements, I take it, of your client, in effect saying nothing happened or nothing was involved and so forth.

That is innocent -- so called innocent statements but I suppose there will be other evidence which will indicate that those statements were false. That is, tend to show they were false.

Now, I think what the Government is saying, why should it have to go through this twice. Your client is not making admissions of guilt, as a person. That is, what he says the jury hears as well as what the Government says tends to make false. The jury still has to make up its mind whether it was false or not because it does the Government no good unless the jury reaches that conclusion. If they reach that conclusion, then they would -- I would suppose, consider that similar testimony

before the Grand Jury or at least before the Grand Jury here, constituted false declarations or perjury.

So, you are saying actually, as I see it, you are asking that there be two trials when we would simply go over the same evidence a second time.

MR. AGULNICK: Yes, but your Honor, we are overlooking one basic factor and that is when these individuals went before the Grand Jury, they were given use immunity and it was made clear to my client that his testimony before the Grand Jury could only be used in a subsequent perjury matter.

It was never made clear to him that at any time or in any way, shape or form, his testimony was to be used in a Civil Rights violation.

THE COURT: The only answer that is available to that, and Mr. DePetris has made it is this: A person is compelled -- a person is protected from compelled testimony admitting his guilt of something. If he gets up there, takes the oath and says, "I didn't do it, I wasn't involved," well, he's answered. If the answer is true, well, that's fine. But if he gets up there after taking the oath and that's false, that isn't compelled testimony. That's voluntarily offered testimony designed to exculpate him, to prevent the Grand Jury from

treating him as one involved or implicating him in any way, and consequently, he thereby exposes himself to rules which have been designed to limit a Fifth Amendment rights to compelled true statements -- true testimony, not compelled false testimony. You understand?

MR. AGULNICK: I understand what your Honor is saying, but I think those rules would only apply in a perjury trial, but not in a matter involving a substantive count, such as the Civil Rights violation.

THE COURT: You are saying in effect by being given the use immunity, somehow or other your client was falsely induced, so to speak, falsely induced to testify before a Grand Jury which he never would have done, right?

MR. AGULNICK: That's a possibility.

THE COURT: Yes. But that doesn't give him a license, once he accepts the immunity, to pervert it, because the purpose of it is that if he tells the truth, he is immune from having that used against him. But if he tells a falsehood before a Grand Jury, he commits really a crime right then and there. That's the crime. A separate, independent offense. If it is, in fact, false

testimony, under oath.

You don't get -- he's been given immunity for his testimony concerning past acts, but his very act of appearing before the Grand Jury, if in fact he did, and testified falsely, is the commission of the crime right then and there, in the presence of the Grand Jury. So, how can he get immunity from that?

MR. AGULNICK: Your Honor, he's not. He's being indicted for perjury. That's the answer to that.

THE COURT: What I'm trying to say is, in this case I would be inclined to agree with the defense position, if I thought an attempt was being made here for the Government to have it both ways, so to speak, but the difficulty -- that is, by utilizing admissions, that would really -- really fall within the scope of the use immunity.

But here, unfortunately for your clients, their actions in that respect under available case law and I am familiar with it, exposes them to the use of that testimony for somewhat collateral purposes, namely impeachment as to the truth of other testimony that they may have given.

If they lie before the Grand Jury, they lie

here in other ways. This may not be helpful to them. But I cannot see how that's unfair in the context that you raise with respect to the use immunity

MR. AGULNICK: What I am concerned about is, Mr. DePetris has stated, as I said before, that he intends to use certain oral statements, made by my client to a fire marshal, to law enforcement --

THE COURT: Right. The effect of which will be that your clients had nothing to do with it.

MR. AGULNICK: It's -- in a nature, it's exculpatory but I believe that Mr. DePetris intends to take statements made by more than one defendant and put them together, to show the inconsistencies and this is his -- the device he is going to use on his direct case.

Now, by your Honor allowing in this Grand Jury testimony in the same trial, I believe that as to the Civil Rights violation, there will be an improper reenforcement of the evidence presented by the prosecutor and that they will -- the jury -- there is no way the jury will be able to separate or differentiate where this evidence is to be used, the fact that the evidence is to be used only as to the perjury counts and not as to the substantive

counts, as eloquent as I'm sure your Honor is going to be in the instructions to the jury, we're dealing with laymen --

THE COURT: It isn't eloquence that's needed. It is clarity of explanation. That's not eloquence. Sometimes that's very rough.

MR. AGULNICK: Okay. It's our position that there is no way a jury of 12 laymen is going to be able to separate and differentiate and say to themselves: Well, this testimony before the Grand Jury, we cannot use it for the perjury count.

There is no way they are going to be able to do that. It's just an impossibility.

THE COURT: Well, there is surface appeal to what you say, but I think when it all analuzes out, if a jury believes the Government's case, I suppose it's very likely they will believe your clients lied before the Grand Jury.

On the other hand, if they reject the Government's case, they are very likely to -- on that evidence, to believe that your clients were not lying before the Grand Jury.

MR. AGULNICK: But that's the point. That's the very point, your Honor. I don't think that the jury should have to evaluate whether my client

lied or told the truth before the Grand Jury in deciding the Civil Rights aspect of the case. You are putting an unfair burden on them.

THE COURT: Maybe I am not making myself clear. I am simply saying that you are saying that the Government really ought to go through two trials here. I suppose in the first instance, if we separate, -- if we received this and concentrated on the Civil Rights case and substantive events relating to that, that would put an end, if the jury came in, that would put an end. There would be no perjury case. That's what you are saying.

MR. AGULNICK: That's a distinct possibility.

THE COURT: On the other hand, if the Government should win, then they have to go back and try this perjury case all over again before a different jury when on that -- if the Government as I say tried it before in this case, in all likelihood if the Government prevails they will prevail on the perjury count to cause its logical -- because it seems to me if your clients had been telling the truth before the Grand Jury, it would be likely that the Government's position would be rejected by the -- by this jury.

MR. DE PETRIS: We wouldn't be making the

position.

THE COURT: They wouldn't be making it. So as I see it, you are really saying that this case should be split in two, for reasons which seem to me not to weigh from your standpoint, simply because in the final analysis, it has to be one way or the other. That is to say, since your clients' position before the Grand Jury was one of complete innocence, that is to say, told their version, which was exculpatory, utterly inconsistent with the idea that they were involved or implicated in this in any way, now, if the Government's proof shows they were, then it seems logical for a jury to conclude that their testimony was false. And I don't see why the Government, if it does prevail on the first part should then have to go back and try that all over again before another jury.

MR. FLAMHAFT: Your Honor, --

(Continued on next page.)

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(Argument continued.)

MR. AGULNICK: The reason being that they gave use immunity. That is the reason. And they told --

THE COURT: You are talking about State immunity in any event.

MR. AGULNICK: No. We are talking about Federal immunity. If your Honor pleases, this is the whole point that I am making.

MR. FLAMHAFT: No sir, your Honor.

MR. AGULNICK: If your Honor pleases, these individuals went before the Federal grand jury and they were told in essence that they were given immunity, and that the only thing that this testimony could be used for was the possible perjury indictment that might flow from their testimony.

My clients, and I believe the other clients, were not told in any way that this testimony could be used, or read, or utilized in any way in a trial involving substantive rights, involving violation of civil rights.

THE COURT: Weren't they instructed, though, of course that if they did not testify truthfully that they would expose themselves to prosecution for perjury?

MR. FLAMHAFT: Yes.

MR. AGULNICK: Yes, your Honor, no doubt about that.

THE COURT: They were placed on notice.

MR. FLAMHAFT: Only for hte perjury count, your Honor.

MR. AGULNICK: Perjury. Never in a thousand years could they have contemplated that their grand jury testimony, no matter what their testimony would be, would be used in a substantive count. And by having this joint trial of these counts, in reality the testimony is being used against them.

MR. FLAMHAFT: Your Honor, if I may be heard.

THE COURT: Yes.

MR. FLAMHAFT: I think, my recollection of a reading of the grand jury testimony, is that only the defendant Barbieri is told by Mr. DePetris in the grand jury that if in fact he does perjure himself is liable for any other indictment than perjury. I think he is told that he may be held in violation of the Civil Rights Act. My client certainly is not, and I don't think the other three defendants are told.

MR. DE PETRIS: They were all told.

MR. FLAMHAFT: I don't remember that from the grand jury testimony. I may be in error. But I think it was only Mr. Barbieri that was told in the grand

jury of that fact.

I raise the question of whether or not the Government is prejudiced by a severance.

And I think my colleagues have spoken to the substantive count in the indictment, the substantive count, that being physical damage to a house.

I raise the question of whether or not -- there is a precedent for joinder in an indictment for a substantive count and a perjury. I do not think there is precedent for a conspiracy count. And that is what you have here. I think a distinction must be made clear in this case that you have a conspiracy count. A conspiracy is only, as your Honor well knows, some thought or some ideas that some people may have in the furtherance of some act. What the Government has tried to do in this case is it is said our clients in thinking committed an act and by their denial in the grand jury they committed two crimes, perjury and in thinking. The Government may very well be in a difficult position if they want to prove a substantive count such as the physical act of putting paint on a house or the physical act of bombing a house. But here you have a verbal commitment, so to speak, by certain defendants as to what they intend to do. And now the defendants in

the grand jury by the use immunity have said that they never even thought of the idea. That is the distinction that I think has to be drawn.

MR. DE PETRIS: Some of the cases that I have submitted to your Honor involve conspiracy and perjury counts.

MR. FLAMHAFT: And I think, your Honor, as precedent in this circuit, I think very recently one of your colleagues in United States v. William Cahn separated -- I may be incorrect again, your Honor -- but I would ask the Court to consider --

THE COURT: Is that Cahn?

MR. FLAMHAFT: Cahn, the district attorney in Nassau County. And I think one of your colleagues severed because he thought that it would be a very, very difficult task for a jury to decide whether or not they can make the distinction between a perjury count and other counts in the indictment.

I don't see the prejudice to the Government at all in this case. I see a whole lot of prejudice to the defendants in this case, especially in view of the fact of the argument I tried to make before, your Honor.

MR. AGULNICK: Just one last point, not to belabor it, your Honor, but I feel that by having the

perjury and substantive counts tried together a jury of lay people will have information in their hands before they begin this trial, or in the early stages of this trial, that these individuals were granted use immunity, and that a grand jury voted an indictment in regard to perjury. And that this jury will have to consider that in deciding the substantive counts. And the prejudicial spillover would be so enormous -- and there is no way to separate these two cases during the trial. And indeed the indictment shows there is an overlap. And Mr. DePetris in his argument talks about the commonality of proof. There is no way that we can separate this from the jurors' minds.

MR. DE PETRIS: Your Honor, the jury will not be advised that the defendants were given use immunity unless defense counsel so wish. I certainly was not intending to bring that out.

And again, your Honor, the defendants have made arguments which possibly on their surface have some plausibility.

But as your Honor pointed out before when we look at what the testimony is before the grand jury, and you look at the pleas of not guilty to this very indictment, and you look at the facts of this case, there is just no prejudice, no likelihood of

prejudice. If at the end of the case some prejudice does appear at the trial, the problem could be resolved at that point in time.

THE COURT: Let me ask you this, as a practical matter, if there were no perjury counts would the proof be substantially the same?

MR. DE PETRIS: Yes, your Honor, the proof would be the same on the perjury trial as it would be on the civil rights trial. So if we had to break it down into two trials, we would be presenting exactly the same case.

THE COURT: That is the impression I had. That is my point. I do not quite understand the prejudice argument, since, as I understand it, the same evidence would be offered on the substantive as on the conspiracy, the same evidence, and the jury will hear that all. Now, the way I see it, if they accept the defendant's position that would be the end of the case on perjury and your client will be free of those counts as well.

MR. AGULNICK: Well, your Honor, it doesn't hold true. I feel there could be a possibility that one juror hearing both types of charges in the indictment might very well decide to compromise by virtue of the quantity involved in that situation and

might decide that although someone did not perjure themself they might have been involved in another aspect of the conspiracy. And that is always prevalent. The overlap is not an identical 100 percent.

THE COURT: That might be true in some situations. But it seems to me to be remote in this case because if the jury does not accept the Government's case, I do not quite understand how they can compromise on perjury.

MR. AGULNICK: Stranger things have happened.

THE COURT: It would be consistent with these people not being involved.

MR. CRECCA: May I be heard?

THE COURT: What is your name?

MR. CRECCA: Anthony Crecca, the colleague of Mr. Peterson on behalf of Barbieri.

I do not mean to compliment your Honor, but certainly as an experienced trial judge, and the gentleman of the bar and my worthy adversary, Mr. DePetris, well understand that oftentimes jurors come in, and my goodness gracious, as this gentleman on my right pointed out, they come in on a compromise verdict where the Court, and defense counsel, and even the prosecutor are astounded. So I think there is much basis to this gentleman's argument.

There is always that possibility, especially on the use immunity factor, and I do not mean to criticize Mr. DePetris -- I have high regard for the gentleman -- but in view of the fact that he did not, as I understand it as conveyed to me by my colleagues, properly explain to their particular clients even though Barbieri -- we concede that Barbieri had some instruction -- it would be a carryover on Barbieri and highly prejudicial without any doubt. And as far as the perjury, there is no immunity that immunizes someone from perjury. Undoubtedly that is conceded. But as far as the conspiracy, if the proper instruction is not given, your Honor, I think as a matter of law the counts not only must be severed, but I will go one step further, they must fall, because with all due respect to his Honor, his Honor certainly cannot put his mind into the mind of any juror.

THE COURT: Well, I did not wish to indulge in peering into a crystal ball by the comment I made.

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But I was simply trying to illustrate that in view of what appears on the fact of the indictment, because of the nature of the statements made by the defendants, they are totally exculpatory, as I read them, and there is nothing there that would mark them as in any way connected with it, and so as I see it, the proof of perjury in this case will have to depend entirely upon the jury, if they accept proof of other witnesses that the defendants were indeed involved. If they don't accept that, out goes the perjury as well. I do not see how it can be otherwise.

MR. CRECCA: Judge, I think that the Court is drawing a conclusion on its own supposition.

Again, to repeat, we in this courtroom cannot predict the outcome of any case or how a jury will vote. That would indeed be prejudicial, to permit the conspiracy to remain and the perjury to remain, especially in view of the fact that federal use immunity was submitted to three of the defendants -- four, other than Barbieri -- who did have some explanation as far as the Civil Rights aspect was concerned. I do not fault Mr. De Petris for that. We are all human.

MR. FLAMHAFT: Your Honor, can I raise this issue?

THE COURT: What is your name again, please?

MR. FLAMHAFT: My name is Mr. Flamhaft. I represent Mr. Lombardi.

This may not be steeped in legal history, but when we try cases, and there are ten counts that go before a jury, it seems to me -- and I have had the experience where a jury has felt that they must give something to the Government; they put in so much time, and so much effort, and so much in resources, let's give them something, even though there is not one iota of proof of what the Government must show. And if you have -- I would much prefer if there is a legal reason for doing so, to have only those counts which are proper before this jury and not have ten counts before a jury so they may hang their hats on one, or throw a bone to the Government, if they so wish.

Now, it may not be a most intelligent argument but I can tell you, your Honor, it is a practical argument.

MR. GOGEL: Of course I apologize for being late, your Honor. But as your Honor has said to Mr. De Petris and other counsel here, it at least appears on the surface that the question of the taint between the several charges arises in your mind, and we as attorneys are trying to separate one from the

other. Can you imagine the layman jury. It must influence them. There is no way they are going to be able to distinguish between the evidence presented as to the perjury and the conspiracy. If we have trouble considering it as a legal issue, the jurors themselves must have a tremendous problem as laymen. Additionally, the least important argument is whether or not there are going to be two trials in this matter. The important premise is whether or not justice is properly done by separating or joining these counts. So whether or not there is the necessity of a second trial, that must be completely unimportant.

THE COURT: Let me ask you this question, you mentioned earlier of using some of this on a similar act basis, as I understood you. Did I understand that correctly?

MR. DE PETRIS: Yes, your Honor, the Tramunti case was a case where the defendants had been given use immunity before a Federal Grand Jury. And then in another case the Government introduced, I believe it was on cross-examination of the defendant, the testimony before the prior Grand Jury which had been given use immunity. And the Second Circuit in Tramunti held that not only could the Government use that on cross-examination because it wasn't compelled testimony,

because it was not the incriminatory truth, not only could it use it on cross-examination but also could introduce on the direct case as a similar act.

THE COURT: As a similar act of what?

MR. DE PETRIS: Pardon?

THE COURT: As a similar act of what?

MR. DE PETRIS: Well, in that case it was a similar act of lying.

THE COURT: Well, I must confess that eludes me. I always thought of similar acts as acts, conduct, engaged in by a defendant criminal in nature which showed a state of mind, a common balance, resolving a possible question of identity. I will have to say that it has been troubling me. You say similar acts here -- are you suggesting, for example, that it is part of the conspiracy here, I guess --

MR. DE PETRIS: I am not suggesting I am going to do that, your Honor.

THE COURT: -- they went before the Grand Jury with the idea of concealing their participation.

MR. DE PETRIS: I am not saying I am going to use it in that fashion. I am just saying I do not intend to. I am saying under the Tramunti case I would be entitled to use it because the Tramunti case made clear, as I read it, that when the defendant goes

before the Grand Jury under use immunity and gives false and non-incriminatory information, that testimony is not compelled and therefore the Government can use it wherever -- in a relevant case.

THE COURT: Well, we do not want to indulge in philosophy. I am talking about the fact we have to deal with practicalities. I will say that I can understand the Government's desire to take advantage of the fact that the same proof would establish both sets of offenses, if we want to call it that. And when I say both, I mean your position is that the same proof will establish not only the civil rights violations but also establish the defendant's guilt or testifying falsely, false declarations. That argument I can understand. And I can understand it from the standpoint of not having two trials, and reviewing the same evidence twice; I can understand that. But the thing that is puzzling me a little bit here is when you say you propose to use a false declaration in some way to impeach --

MR. DE PETRIS: I didn't make myself clear on that, your Honor. I do not intend to use that as such. I am saying that under the Tramunti case, I believe, if I wanted to in the trial of the Civil Rights charges, I would be able to introduce their

testimony before the Grand Jury as a false exculpatory statement just like I could introduce the testimony of the Fire Marshal and the Police Detective as a false exculpatory statement. I believe I can do that under the Tramunti case. I do not intend to do that. I was just giving an illustration to your Honor that under the Tramunti case that even if there was a severance, I would be entitled to use the Grand Jury testimony of the defendants where it is not compelled, and in this case it is not compelled because it is not the incriminatory truth.

I did not mean to indicate to your Honor I intended to do that. I do not think it is necessary in this case.

And a further point I wish to make is each defendant, and I can read it to your Honor in the Grand Jury testimony, was advised of the consequences of lying before the Grand Jury, that it could be used against him in a perjury case, each and every one of them.

MR. FLAMHAFT: We don't question that. There is no dispute of that --

MR. DE PETRIS: And they were given full opportunity to consult with their counsel. So there is no impropriety there.

And third, your Honor, we have been sitting here for some time and I still have not heard any of the defendants articulate as to how they are going to be prejudiced.

(Continued on next page.)

GR:em

THE COURT: Well, in one way, a practical way, they say the presence of these counts may prompt a jury to arrive at a compromise verdict.

First of all, as Mr. Flamhaft pointed out, the very number of counts involved here might tend to make a jury feel they had to find the defendants guilty of something.

The Government has invested a lot of time and effort in the case, these perjury counts don't sound quite as bad as these civil rights counts, we'll find that they didn't tell the truth before the Grand Jury as they should have and we'll punish them for this. We'll convict them for that. That is their practical argument.

MR. DE PETRIS: The case law I have given to your Honor rejects that.

In addition, at this point in time that's sheer speculation.

As I said to your Honor before, if at the end of the trial some prejudice does appear, we can resolve the matter at that point in time, but at this point in time, on sheer speculation, I don't see any reason justifying the Government going through two separate trials, with exactly the same evidence.

THE COURT: As a result of this discussion,

I feel, in my own mind, that I should not rule that the perjury counts be severed at this time.

However, I will reserve judgment on the advisability of that before the case goes to the jury, or it may be at an earlier point if something comes up which raises a problem in that respect --

MR. FLAMHAFT: Your Honor, can we have some verbalizing from the Government --

THE COURT: That would leave it up to you, however, bearing in mind the question of whether or not you want to press the motion for severance.

MR. FLAMHAFT: I will press it, unless the Government tells me that in his direct case he does not intend to show that these defendants were given use immunity.

MR. DE PETRIS: I do not intend to show that.

THE COURT: He does not.

MR. DE PETRIS: In fact, I have spoken this morning with the defendants, your Honor, and I believe -- defense attorneys, and I believe as to the question of the Grand Jury testimony, we've reached agreement, at least I spoke to some of them, as to how to introduce them.

Your Honor, I would not even offer the Grand Jury transcript of the defendants in evidence. I think

we've reached an agreement that we will reach a stipulation that the testimony as set forth in the indictment was given by the defendants while under oath before the Grand Jury, that it was given before the Grand Jury and a brief statement as to the nature of the investigation, civil rights offenses, and that's it, subject to the reservation, if there is anything else in the Grand Jury that the defense wants to put in, that we can put it in.

But that way -- there is absolutely no way that I am going to refer in any sense to the fact that there was use immunity given. That's up to the defense counsel, whether they want to --

MR. FLAMHAFT: Okay.

THE COURT: As I say, in -- I am going to hold or reserve a decision in this matter at this time. You will be given an opportunity to inform the Court that you wish to withdraw the motion for severance, too, you know, because, after all, if you do not and I decide to sever your clients may well face a second trial.

So I will not close the door on you in that respect, and the more I have heard arguments and both sides, and in view of the Government's representations here as to what it does not intend to do, which is

what caused me some problems because I think I probably did misunderstand Mr. De Petris at the outset, but nevertheless, I don't think this is the time to arrive at a decision you are asking me to make.

MR. AGULNICK: May I ask, is your Honor going to proceed with a trial of all the counts?

THE COURT: I can still take those counts from the jury with your consent.

MR. AGULNICK: But the jury, in reality, is going to hear the entire fabric of the indictment.

THE COURT: Nevertheless, remember, the jury often hears many things at the outset of the case which the Judge tells them what they are going to concentrate on at the end of it, that is what it is going to be.

MR. AGULNICK: But the impact would be exactly the same. I don't think that -- that's why we're asking for the ruling now, Judge.

THE COURT: My point is, it is perfectly obvious, it becomes more obvious all the time, that the same, identical case is relied upon by the Government as supporting the two different sets of charges. So the jury is not going to hear anything different if I pick out these conspiracy charges right now. That same case is going to be heard by

the jury. Do you understand?

You don't disagree with that, do you?

MR. AGULNICK: Well, the difference being they won't hear the Grand Jury testimony of the respective defendants.

THE COURT: They are going to hear through a witness, presumably the fire marshal, about certain interviews, right?

MR. DE PETRIS: Yes.

MR. AGULNICK: They'll hear about an interview that consumed maybe two written pages as opposed to hearing fifty or sixty pages of Grand Jury testimony. because if we open up the perjury aspect on this trial, then we have to come back.

THE COURT: As I say, I am holding myself in the fluid state, and if I have to shift a gear, I will do it.

But for present purposes, it seems to me that this would be the same case, the same evidence, if there were no perjury counts at all.

Now, if I am mistaken in that, and it becomes clear through presentation of evidence or through further enlightenment from defense counsel that I must make the ruling you request now, I will certainly reconsider it. I am keeping an open mind on it and

it may be that at some point I might even take those counts away from the jury entirely, with your consent, on the understanding that the jury will be permitted to focus solely --

MR. AGULNICK: Your Honor, I think the only device on hand for us at that point would be to ask for a mistrial.

THE COURT: We will see about that.

MR. AGULNICK: I'm fearful of that. I wish to bring that to the Court's attention because we feel that just leeting the jury have these counts at any point in the proceeding is enough to do the damage, that the damage has been done.

Also, your Honor, further, if your Honor had decided that there should be a severance of the counts, I think we would be genuinely entitled to have a Tate hearing as to the civil rights aspect, to inquire as to whether the Government did use this Grand Jury testimony in regard to the civil rights investigation.

By having this joint trial, we're effectively deprived of that hearing.

MR. FLAMHAFT: Your Honor, that is the second part of my motion. I think what Mr. Agulnick just raised. We're not sure at this time, and I think it is the burden of the Government under the

Zacharelli case and also under Murphy vs. The Waterfront Commission, that if in fact these defendants -- and I think it has been conceded that the defendants have received use immunity -- now I think we must inquire and we must go one further step and the burden is on the Government to determine what independent sources the Government had to produce this indictment.

THE COURT: That was laid out rather precisely and compendiously, I thought, in Mr. De Petris's original affidavit.

Of course, if you want to put witnesses on?

MR. AGULNICK: No, your Honor. His affidavit dealt with the State Grand Jury and the taint in the State Grand Jury.

We're talking now about the taint from the --

MR. DE PETRIS: The affidavit will be substantially the same, as to the Federal Grand Jury testimony too, your Honor.

THE COURT: I assume that there really would be no difference.

MR. DE PETRIS: I was -- after the case is over, I think the way we left it before, that after the trial is over and if it is not moot by a verdict of acquittal, if there is a verdict of guilty, we

would then at that time come forth at an evidentiary hearing and establish that -- the independent source which I represented we had in the affidavit, and because of the fact that there was nothing incriminatory in the State Grand Jury testimony of Anzalone and the same thing would apply to the Federal Grand Jury testimony of the defendant, I believe we resolved that there wasn't any substantial likelihood that there was going to be any taint so we left it open until after the trial for an evidentiary hearing, when we'll have all the Government's evidence on the record and then I can go right down the line and establish the independent source as to each one.

MR. AGULNICK: I think we overlook a point. Mr. De Petris talks about whether it was incriminatory or exculpatory in any way. I think we overlook the basic point of the proper conducting of Grand Jury proceedings.

If somebody is given an instruction, a witness, and is told that the testimony can only be used in a certain way --

THE COURT: Truthful testimony.

MR. AGULNICK: I understand that, but by our standing here and pleading not guilty, we are in effect stating that our clients testified truthfully.

I think that we're faced with a tremendous problem, where the Government, whether it be the State or whether it be the Federal Government reneges on the promise and, in effect, violates the immunity laws, and that's what we have here.

MR. FLAMHAFT: May I make this suggestion to your Honor? Perhaps your Honor would like to look at the Grand Jury testimony of those witnesses whom we feel did not receive the proper instructions by Mr. De Petris to determine whether or not there was an independent source and whether or not they were told that if in fact they perjured themselves or they did not tell the truth, I'll use it that way, that they were subject to other violations.

MR. DE PETRIS: Your Honor --

THE COURT: Wouldn't this appear at the opening of each?

MR. DE PETRIS: I'll be glad to submit the Grand Jury testimony to your Honor.

THE COURT: You differ?

MR. FLAMHAFT: I do differ, yes, most respectfully.

MR. DE PETRIS: On the question of use immunity, your Honor, again I -- I mean, the defendants are coming here in -- in on the day of trial and making

a new motion and I don't see delaying the trial for this matter, when -- as with the other use immunity question, we decided that it could best be resolved at a post-trial evidentiary hearing, and I would submit that the jury is waiting.

MR. FLAMHAFT: There is no jury waiting.

THE COURT: Their point here -- as I understand their point, they say, their new point really seems to be that their clients were not adequately apprised when they elected to testify after having been given use immunity.

MR. AGULNICK: And by virtue --

THE COURT: That their testimony would be used against them, that the testimony they gave would be used against them.

Now, I do not know how that squares with being told that -- of course, if they testify falsely, they expose themselves to charges of perjury.

I would think any normal person would understand that that method -- his testimony would be used against him for that purpose.

MR. FLAMHAFT: That is correct.

MR. AGULNICK: Yes, your Honor, but I as an attorney and my colleagues as attorneys could not counsel our clients to the possibility that their use

immunity and their grand jury testimony could be used against them later on on a direct case, in a civil rights violation. There was no way in a thousand years that we could have given legal counsel as to that possibility or eventuality.

The only thing we as lawyers could do was to tell our clients to tell the truth, you've been given use immunity or else you'll be indicted for perjury.

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MR. DE PETRIS: I don't quite understand the argument, your Honor. Is defense counsel suggesting that if defense counsel had happened -- had read the Traumunti case and had advised -- advised the defendants if they testified before the Grand Jury not only could they be indicted for perjury, which each and every one of them was told, but that they could also -- that they would also -- could be used against them on a substantive count, if they had read the Traumunti case and advised the witness of that? Something different would have happened?

MR. AGULNICK: Your Honor, our understanding of the law is different from the U.S. Attorney, obviously.

THE COURT: He is saying -- he seems to be saying that they were never given to understand that if they testified falsely, the testimony they gave would not only be used against them for purposes of prosecution for perjury, but would be used against them for purposes of prosecuting a separate and distinct crime; namely, this civil rights crime. That is what I understand them to say.

MR. FLAMHAFT: That's correct.

MR. AGULNICK: And --

THE COURT: I do not know whether that is a

valid argument or not, at the moment.

MR. DE PETRIS: What I am trying to understand, your Honor, is -- given that statement, what effect does it have?

MR. FLAMHAFT: I think before we get to that, if we reach-- we haven't reached that point. We don't know what we might have done. That's all speculation.

The fact is that we were not told that and what object -- what alternatives were open to us at that time was never raised because the question was never put to us and we couldn't advise our clients.

MR. AGULNICK: It seems puzzling to me that one of the defendants was told that this testimony might be used in a civil rights violation at a later point.

MR. DE PETRIS: No defendant was told that. All defendants were given --

MR. AGULNICK: Barbieri you told in the Grand Jury.

THE COURT: I do not think -- are you referring to something Mr. De Petris said?

MR. AGULNICK: Yes. It is my recollection that Barbieri was told it might be used in a civil rights violation and conspicuous by its absence was

the same admonition to the other defendants.

MR. DE PETRIS: The same advice was given to each witness.

MR. FLAMHAFT: I'll make the same suggestion. Would your Honor care to read the Grand Jury minutes?

THE COURT: Only that part at the outset, where they are instructed.

MR. FLAMHAFT: Right.

THE COURT: Have you got those handy?

MR. DE PETRIS: Yes, your Honor.

THE COURT: All right. Let me see them.

MR. DE PETRIS: Your Honor, I think I've located what the defense counsel have been referring to and I think it -- there was no different advice, and I could direct your Honor to the pages that they are referring to.

M R. FLAMHAFT: I'm sorry?

MR. DE PETRIS: There was no different advice.

THE COURT: All right. Let me --

MR. GOGEL: Your Honor, as to Vivelo, it is quite clear in the Grand Jury minutes that the only advice given to the defendant was the recitation of Section 6002, which was read as a quotation to the defendant, where he was specifically advised that the information may be used only for prosecution of perjury,

giving of false statement or otherwise failing to comply with the order, the order compelling the grant of immunity.

That's on page three of the Grand Jury testimony of Vivelo, starting at the bottom of page three and going into page four.

THE COURT: Let's see.

MR. GOGEL: That was the extent of the warning to my client. Starting with line 21 on page three.

THE COURT: Well, that statutory language does seem to be rather precise in stating that "No testimony or other information compelled under the order or any information directly or indirectly derived from such testimony or information may be used against the witness in any criminal case, except a prosecution for perjury."

You seem to be suggesting that the testimony may be used in a prosecution for a civil rights violation as well.

MR. DE PETRIS: Suggesting where?

THE COURT: You say.

MR. DE PETRIS: Now?

THE COURT: Yes.

MR. DE PETRIS: That --

THE COURT: That seems to be your position.

MR. DE PETRIS: No, your Honor.

This is what my position is, if I may make -- try to make myself clearer.

No. 1, this is -- this indictment is a prosecution for perjury or, rather, giving of false statements.

THE COURT: But it also is a prosecution for a separate and distinct crime, and their point seems to be that the testimony which could be used against them under the statute for prosecution of perjury is now going to be used against them in connection with their prosecution for separate and distinct and different crimes.

MR. DE PETRIS: No, your Honor, because your Honor is going to -- I am going to request that your Honor -- and I'm sure your Honor will give a limiting instruction to the jury, as I pointed out in my initial argument, that it will not be used against them but -- and beyond that the Traumunti case makes it clear that the -- that the situation set forth in the statute as to when the testimony can be used applies to compelled testimony, incriminatory testimony.

THE COURT: Say it again. Wait a minute. You are getting ahead of me here.

The statute is quite clear in saying that it may not be used directly or indirectly. "No testimony or other information compelled under the order or any information, directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case, except a prosecution for perjury, giving of false statement or otherwise failing to comply with the order."

Now, their point seems to be that the limiting instruction does not satisfy the statutie.

I do not know whether you say the Traumunti case explicitly ruled on this point or not in saying that it does.

I am simply saying that the statute on its face seems to be quite precise and limited, and they seem to be suggesting that the Government here is going beyond the scope of the statute becausie you do intend to bring this evidence before the jury in connection with the charges against the defendants of the civil rights -- conspiracy and civil rights violations, and to the extent their use immunity is being violated.

MR. DE PETRIS: I understand.

THE COURT: That seems to be the essence of their argument, as I understand it.

MR. GOGEL: That is correct.

MR. PETERSON: Yes. Even further, Judge, what have they gotten? Have they received use immunity? Absolutely not. If the jury is going to use the testimony. They have received no rights under the statute. If the jury is going to hear it.

MR. DE PETRIS: Your Honor, I understand that argument and I have three main responses to that argument.

One, the statute on its face doesn't cover the -- doesn't, at least with clarity, cover the situation where there are -- there is -- this is a criminal case for giving false statements. There are other counts joined with it, and properly so, under the case law.

The statute does not specifically direct itself to that situation. T hat's the first point I would make.

The second point, because under the -- any interpretation of the statute, this may well be a criminal case for giving of false statement and it is, although it does have additional counts joined with it.

Secondly, although the statute does not deal directly with this issue, my second point is that the

Court will give a limiting instruction to the jury that they cannot use the Grand Jury testimony against the defendants on the civil rights counts.

An instruction such as this was given in the Gill -- in the Pacente case that I gave your Honor, the Braasch case that I gave your Honor.

THE COURT: I haven't had a chance to read those.

MR. DE PETRIS: And the Gill case.

Those three cases were not concerned with the issue of use immunity, but they iwere concerned with the issue of a limiting insturction being given to the jury, not to use the Grand Jury testimony on the perjury counts against the defendants on the nonperjury counts.

That instruction was given and the Court of Appeals upheld it.

So my second point is that that -- the Grand Jury testimony will not be used against the defendants on the civil rights counts in this indictment because of the limiting instruction.

I went through a series of arguments explaining my position as to why that instruction could be followed; and that is, because it was -- basically it was because the testimony was not incriminatory.

My third point would be --

THE COURT: What you are really saying is that the limiting instruction is enough to satisfy the statute, and in my mind there is a question regarding that.

MR. DE PETRIS: That is my --

THE COURT: Because to me the statute is fairly clear and precise. It says "No use, directly or indirectly."

MR. DE PETRIS: That's correct, your Honor.

THE COURT: And that is their point, that they say the -- a use is being made of this perjury testimony in connection with the charges against them, separate and distinct charges of conspiracy and violations of civil rights, which arise directly out of the acts that were the subject of their testimony before the Grand Jury.

MR. DE PETRIS: But, your Honor, if your Honor gives the instruction and if it is followed, then there will be no use of that Grand Jury testimony in violation of the statute, and just like in the Bruton line of cases -- the Bruton cases prohibit the use --

THE COURT: I took down the numbers of those cases. Which of those three cases do you say deals with that point that we have been discussing?

MR. DE PETRIS: The issue of a limiting instruction?

THE COURT: Yes. On the question of use immunity.

MR. DE PETRIS: No, your Honor. There is no case directly on point on the question of use immunity. There is no case directly on point.

THE COURT: I think that is what the whole problem is here.

MR. DE PETRIS: No, your Honor. But those -- no, your Honor.

Those cases, the Pacenti case, the Gill case and the Braasch case deal with the question of a limiting instruction which will be given in this case to the jury, not to use the Grand Jury testimony against the defendants, and the courts upheld that.

THE COURT: Was it immunized Grand Jury testimony?

MR. DE PETRIS: No, your Honor.

THE COURT: Oh. Isn't that the critical difference?

MR. DE PETRIS: But, your Honor, if the instruction is given and it is followed, then there is no use.

THE COURT: You keep saying that, but I keep saying I could just as anything that is brought before

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the Grand Jury which is the subject of immunization, can only be brought in the context of a perjury prosecution, not in the context of another prosecution as well. I do not think it is an answer to say that a limiting instruction is enough to satisfy the statute.

At least at the moment I -- I thought some of the cases you had cited did deal with that point.

MR. DE PETRIS: No, your Honor. The cases dealt with the point of whether a limiting instruction in this regard as -- would be effective, and in my argument on top of that is if it is effective, then there is no use.

The Constitution of the United States prohibits the use against the defendant of a statement in violation of Bruton and the case law holds that in a situation where a limiting instruction is given and it can be effective, the Catanzarro case and the additional cases, that Constitutional prohibition of the Sixth Amendment has not been violated. This is only a statutory prohibition.

THE COURT: In my opinion, this is an exception to the use of testimony before -- given before a Grand Jury and, consequently -- and that exception is if somebody goes before a Grand Jury under this

immunized use basis and commits perjury or false declaration, he may be prosecuted and that evidence may be used against him for that purpose and that purpose alone.

You are saying well, you satisfy the statute if you explain that to the jury.

They are saying that isn't, because that testimony is also before the Grand Jury -- also before the trial jury in connection with a separate and distinct prosecution of separate and distinct offenses and it is impossible to erase it from the jurors' minds.

MR. DE PETRIS: But under the statute, the statute prohibits not coming before the jury. It prohibits it being used against them, and if the instruction is followed, it will not be used against them, and I submit in this kind of case, where the testimony before the Grand Jury is not incriminatory, the jury is going to very easily follow that instruction because they couldn't give any use to it on the civil rights counts, because there is nothing there to use. It's all denials.

THE COURT: I realize that is your overall point, but, again, that does involve, to some extent, reading jurors' minds. I have to say that. I have to agree with that.

In other words, you say -- you do not view this as very helpful to the Government's position, if believed, and that was my attitude, too; but I am also persuaded that we are to some extent making up the minds of jurors on this subject and we have no way of knowing what they will do with it or how they will view it, in reality.

MR. DE PETRIS: That's why I submitted --

THE COURT: Of course, the Court has ruled many times that the fact that the jury's verdict is inconsistent is not a ground for setting it aside.

MR. DE PETRIS: That's a problem that we should face later, your Honor.

THE COURT: I understand that.

MR. DE PETRIS: At this point in time --

THE COURT: My point is, it is possible for a jury to come out with a -- what to us would be an inexplicable verdict, but so long as there would be evidence to sustain it, you know, that one could find some evidence somewhere, it must stand. It can not be set aside as against the weight of evidence.

MR. DE PETRIS: That question, your Honor is speculating at this time as to prejudice.

THE COURT: I think we're all indulging in a little speculation here as to what a jury will do

when they hear this testimony, which you and I have both expressed our opinion as being exculpatory.

MR. DE PETRIS: That's why, your Honor, I submitted the case law to your Honor, the Gill, Pecante and Braasch cases.

THE COURT: Which ones are those? I've got the numbers. Gill is which?

MR. DE PETRIS: 490 F. 2d, 233.

THE COURT: That is Gill.

MR. DE PETRIS: At page 239.

THE COURT: I have that. I did not identify them by names.

MR. DE PETRIS: Pecante, 503 F. 2d.

THE COURT: Pecante.

MR. DE PETRIS: And Braasch, 505 F. 2nd.

THE COURT: Braasch.

MR. DE PETRIS: Those cases have held that a jury could follow such a limiting instruction, that it was sufficient.

THE COURT: But not to satisfy --

MR. DE PETRIS: It wasn't concerned with the legal issue of satisfying the statute because the use immunity was not involved, but it was concerned with the practical matter of the sufficiency of an instruction.

THE COURT: What I would be interested in, is your bright young assistants upstairs, interns or what-have-you, finding out whether or not there are any cases that deal with the point that I raise here as to whether compelled testimony which can be used for purposes of prosecution for perjury may also be used in another respect because the defendant charged with perjury is also charged with some other crime. You understand?

MR. DE PETRIS: Yes, your Honor.

THE COURT: That is really the point.

MR. DE PETRIS: There are no cases directly on point.

THE COURT: You looked for it and did not find any?

MR. DE PETRIS: There are no cases. It's a relatively new statute, the use immunity statute, and the issue hasn't come up, but the Traumunti case is very instructive in that regard.

THE COURT: It's been around since 1970.

MR. DE PETRIS: '72? '70?

In any event, there is no case directly on point. However, the Traumunti case is instructive on this question, because the Traumunti case does go into the question of the meaning of the statute,

except in the prosecution for perjury giving of false statement or whatever. They deal with various -- various use immunity statutes.

THE COURT: I will read Traumunti.

MR. DE PETRIS: And Traumunti says that the limitations given in a statute in the use immunity statutes are not -- what's the word -- are not inclusive.

In other words, where it's not compelled testimony, that is, where it's not incriminatory -- the incriminatory truth, then the exceptions in the statute are not the only exceptions provided.

So I think that's instructive in this case, that in a situation where you do have the non-incriminatory truth, you're not bound by the exact wording of the statute, although I would submit that the wording of the statute is complied with by the limiting instruction, but beyond that, Traumunti indicates, by analogy, that you don't have to worry about the exact language of the statute when you have nonincriminatory testimony, where it's not the incriminatory truth, and they were dealing -- they discuss cases where there are a number of statutes. For example, one statute where they didn't provide an exception for perjury, I believe, and the Court --

the Court held that even though that limitation is not in the statute, where it's not incriminatory, where it's not the incriminatory truth, it's implied, and that's the analogy I would make here, that where you're not dealing with the incriminatory truth, then this is a permissible use; at least where the instruction could be effective.

In this situation, where you don't have the incriminatory truth, the instruction can be effective, and that's my point.

So I think that the Traumunti case, although not directly on point, is strong case law in the Second Circuit supportive of the position here that we don't have to interpret the precise language of the statute.

MR. AGULNICK: Your Honor, may I be heard just very briefly? I know we've been talking about this for an extended period of time.

But basically I think it is our contention that by virtue of the use immunity being given to these individuals, that in effect the Grand Jury which heard the evidence in this case could only properly vote or bring forth a perjury indictment and that they could not bring forth an indictment involving civil rights violations for the same reasons that we said before,

that there is no way there could be a limiting instruction in regard to how the testimony is to be used, to tell the Grand Jury that you can only use this testimony, which you had before you, which you've seen, you can only use it for one aspect but you can't us it for another aspect is -- is impossible, so that we submit that the only thing that this Grand Jury could possibly have voted an indictment for would have been for perjury, by virtue of the giving of the use immunity, even though Mr. De Petris --

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THE COURT: That's a new point?

MR. DE PETRIS: That's a new point. Another new point which was not raised at the time of the motions.

MR. AGULNICK: Your Honor, I brought that point forth from your Honor's reasoning and I was trying to think back to the origin of the case and I look and I see that Mr. DePetris did instruct the Grand Jury as to the law.

THE COURT: Which transcript are you referring to?

MR. AGULNICK: I am looking at Mr. Barbieri's testimony.

THE COURT: Barbieri's?

MR. CRECCA: If I may interrupt for a moment, that's what I originally stated in my very first comment, that immunity does not immunize anyone from perjury but the instructions given to the Grand Jury on the use immunity cannot uphold the conspiracy. Based upon Mr. DePetris' instruction to the Grand Jury and I certainly don't think it was intentional, Judge. Undoubtedly, it wasn't intentional.

MR. DE PETRIS: I don't think Mr. Crecca fully appreciates the law as to use immunity.

MR. CRECCA: Well, I --

MR. DE PETRIS: I instructed the Grand Jury that the testimony -- testimony -- that the use immunity testimony given by the defendants before the Grand Jury could not be used by them in voting the -- I did this out of an abundance of caution, should not be used by them in voting the Civil Rights indictment.

MR. AGULNICK: I say that there is no way he -- an effective limiting instruction could be given to a Grand Jury, which heard the very testimony.

THE COURT: Yes, but I am not altogether sure about that because -- let me put it this way: What I seem to be saying is this: The Grand Jury could have been sitting for months and have heard all kinds of witnesses and enough evidence to find an indictment against A, B and C for Civil Rights violations.

Now, the Government, for whatever reason, brings A, B or C before the Grand Jury, gives them this use immunity. What you seem to be saying is that once the Government has done that, it has given them a release on all the other evidence the Grand Jury has heard because you seem to suggest,

that all the Grand Jury can do in that circumstance is to return simply a perjury indictment.

MR. AGULNICK: What I am suggesting is that there should have been two separate Grand Jury proceedings, so that there would be no prejudicial spillover or taint.

THE COURT: I understand, that would seem to be one logical --

MR. FLAMHAFT: Solution.

THE COURT: -- antidote or solution, but, nevertheless, it does raise the question of whether a Grand Jury simply because certain witnesses have been brought before it, now may not be -- charge them for the crimes but only for the crime of perjury. And that doesn't strike me as having been the intent of Congress, by any means but I am not prepared to expound on that. I think I will consider this matter, but based on what I have seen of these transcripts, I don't think any hearing is necessary here. To me it's -- largely a legal question.

MR. AGULNICK: I believe so. At this point.

THE COURT: So, now, what else remains here to be discussed.

Do defense counsel have any suggestions for

Q Mr. Schlictinger, how old are you?

A 31.

Q Where do you live?

A Staten Island, New York.

Q Would you tell us briefly what your education is?

A High school and partial college.

Q And where did you go to college?

A Real estate schools throughout the country.

Q You went to high school on Staten Island?

A Yes, Curtis High School in Staten Island.

Q Where did you go to college or partial college?

A Brooklyn Poly Tech.

Q And, Mr. Schlichtinger, am I pronouncing that correctly?

A Yes.

Q By whom are you employed?

A Self-employed, sir.

Q And in what business are you self-employed?

A The real estate brokerage business.

Q And how long have you been so employed?

A For approximately 12 years.

Q And is there a particular name which you have for your business?

A The company is Willow Creek Realty Company.

Q Is that a corporation, partnership, sole proprietaryship or what?

A It's a sole proprietaryship, sir.

Q Where is it located at this time?

A Staten Island.

Q Where on Staten Island?

A Forest Avenue in State Island.

Q And directing your attention to the year 1972, where was your business located at that time?

A My principal office was located on Richmond Road in Staten Island.

Q You say principal office. Did you have more than one office?

A I had three at the time, sir.

Q And where were the other two located?

A One was on Huegonot Avenue and one on Forest Avenue.

Q Now, could you tell us approximately how many employees your company had in 1972?

A We had one employee. However, we had fifteen to twenty sub-contractors which are commonly referred to as salesmen.

Q When you say you had one employee, what position

was that?

A Secretary.

Q And she was on the salary of the company?

A Yes, she was on salary.

Q And you say you had various sub-contractors, you say?

A Yes, salesmen who sell real estate for a commission.

Q So they weren't on salary from the company, they would receive a commission for whatever sales that were made in connection with your business?

A Yes, sir.

Q Now, could you briefly describe to the Grand Jury the nature of the typical transaction in which you would be involved?

A Primarily we sell one and two family residences in Staten Island. And a typical transaction from beginning to end would be first to obtain an employment from an owner who wishes to sell the property.

Q When you say employment, what do you mean by employment?

A The owner of the home would want to sell the property and say, "Mr. Broker, this is the price I want and these are the terms under which I wish to sell it. Would you

sell it for me. What is your fee?"

We establish that and then we go out and market the property. And marketing is advertising, promoting it in any way that it is legal to do so.

Q And you receive a fee for this? Is that correct?

A Yes, sir.

Q And is that called a brokerage commission? Or what is the term used to describe it?

A A brokerage commission, generally six percent of the selling percent.

Q Under what circumstances would you generally receive a brokerage commission?

A Only if andwhen a willing buyer is secured by the firm, that is, either myself or one of my sub-contractors salesman, and that buyer is able to purchase the home for a price that the seller agrees to accept. Then we have earned our fee.

Q And directing your attention again to the period of 1972, 1971 and 1972, how was your business doing during these years?

A Fairly well, sir.

Q And are there any requirements, by the way, in order to be a real estate broker?

A The requirements are -- State of New York

requiresments, that you have a specific number of hours, experience and education.

Q Are you licensed by the State of New York?

A Yes, sir.

Q Did you have to take any tests in that regard?

A Yes, sir.

Q Would you just describe to us the nature of those tests.

MR.FLAMHAFT: We will concede he is a licensed real estate agent.

MR. DE PETRIS: Okay, fine.

MR. FLAMHAFT: Thank you, Mr. De Petris.

Q Mr. Schlichtinger, are there any laws which cover the business of real estate brokerage?

A Yes, sir.

MR. PETERSON: Objection, your Honor.

THE COURT: All right.

Where are you going from there?

MR. DE PETRIS: Shall I be more specific, your Honor?

THE COURT: Yes.

Q Are there any laws that govern your business dealings with respect to discrimination?

A Yes.

MR. PETERSON: Objection, your Honor.

THE COURT: I will overrule the objection.

Go ahead.

THE WITNESS: Yes.

Q And what is your understanding of that?

A The laws that govern real estate brokers also govern owners of property, that they shall not discriminate in the sale or rental of real estate.

Q And discriminate in what sense?

A In the sense of refusing to rent or sell real property to anyone because of race, color, creed, national origin, sex or age.

Q Now, during this period of time, can you tell us what -- did you make sales and rentals in your capacity as a broker to people of various races and color?

A Yes, sir.

Q Who was most of your business with?

A As a race, white people.

Q And did you have any sales or rentals in your capacity as a broker to black individuals?

A Yes, sir.

Q Would you tell us approximately how many?

A Approximately eight or ten in a period of ten years or so.

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Q As you say, most of your business was with white people. Is that correct?

A Most of the time.

Q Are you familiar with the term -- withdrawn, your Honor.

Now, Mr. Schlichtinger, directing your attention to the years 1971 and 1972, were you then familiar with the house located at 351 Milton Avenue on Staten Island?

A Yes, sir.

Q And, could you describe that house, please?

A It's a one family semi-attached frame dwelling situated on a 25 by 100 lot.

Q When you say semi-attached, what do you mean by that?

A There is a common party wall between it and a similar house.

MR. DE PETRIS: Your Honor, at this time I would offer into evidence a chart and have it marked as Government exhibit 1 and offer it into evidence.

THE COURT: Has counsel seen this chart?

MR. CRECCA: May I take a look, please?

(Whereupon counsel confer with each other out of the hearing of the court reporter.)

MR. CRECCA: May we approach, sir?

THE COURT: Yes.

(The following takes place at side bar and out of the hearing of the jury.)

MR. CRECCA: At this point in view of my observations of the sketch that my worthy adversary desires to introduce in evidence, in my opinion, sir, and based on my own observations and, of course, I cannot be a witness and I would not interject myself, but in this case I will, I must renew my application that this jury actually be shown the area because it is confusing.

MR. DE PETRIS: I think what they are getting to, your Honor, is that this chart --and if you recall I produced this chart at the hearing back in April, so if there were any objections it could have been corrected at that time and none were made and your Honor gave them a few days to make them and none were made in those few days.

Now, last week Mr. Flamhaft spoke after the trial had started. But the only apparent objection they have is that the house does not reflect the doors and where the doors were, that they were recessed and various elements like that.

I would be glad to stipulate that this is not

being offered to show where the house was located with respect to the street or how far it was away from the street or anything like that. This is simply to show the addresses of the houses and who lived at those houses at that particular time.

We will have photographs to show the particular house in which you will be able to see the recessed door at 351 Milton Avenue and any other photographs the defense counsel would like would be brought in. And they still have their application about viewing the premises.

But at this time it's only being offered to illustrate --

MR. FLAMHAFT: The physical layout.

MR. DE PETRIS: Yes, and who lived in those houses at that particular time.

MR. FLAMHAFT: It's acceptable to my client.

MR. CRECCA. This does buttress my application, your Honor, because regardless of the Court's instructions that will indeed be one hundred percent accurate, in view of the fact that we are dealing with lay persons, it could possibly leave some points of confusion.

THE COURT: I still have that under advisement.

At any rate, with that understanding, you may have it marked in evidence.

MR. DE PETRIS: May we move it to the jury?

THE COURT: Yes.

The clerk will mark it first.

(The following takes place in open court and in the presence of the jury.)

THE CLERK: Chart received in evidence as Government exhibit 1.

(So marked)

(continued on next page)

MR. PETERSON: May we have a stipulation, Judge?

MR. DE PETRIS: I will make it clear exactly to the jury what this is being offered for, your Honor.

MR. FLAMHAFT: That will be fine, then.

MR. DE PETRIS: Your Honor, this chart is offered simply to show the physical layout of the area, the street numbers of the various houses and the names of the individuals who lived in those particular houses at that particular time. It does not reflect the situation or how far back from the street the particular house was or how far back the door was or anything of that nature. It simply reflects the location of the various numbers of the houses and the persons who lived in the houses at that point in time.

With that understanding I think it has been admitted into evidence.

MR. FLAMHAFT: No objection.

DIRECT EXAMINATION

BY MR. DE PETRIS CONTINUING:

Q Now, Mr. Schlichtinger, you testified you were familiar with the house at 351 Milton Avenue. Can you point

it out on Government exhibit 1 in evidence?

A Yes, sir.

Q Could you point out Milton Avenue to the jury?

(The witness indicates.)

Q And is that a dead end street?

A Yes.

Q And could you point out Tysen Lane?

(The witness indicates.)

Q Now would you please tell the jury what your connection was with that particular house?

A I had owned the property in '72, '71. Prior to that my company had sold the property to Roy and Jane Gebhardt in 1969.

Q So your first connection with the house was in 1969. Is that correct?

A Yes.

Q What was your role in connection with the house at that time?

A As a broker.

Q And would you tell us what you did in that regard?

A One of my salesmen sold the property to Roy and Jane Gebhardt around October of 1969.

Q Did you know Mr. Gebhardt at that time?

A Yes, I went to school with Roy Gebhardt.

Q When you say school, which school?

A Curtis High School, sir.

Q And were you friends with him?

A Yes.

Q And there came a time the house was purchased by Mr. Gebhardt. Is that correct?

A Yes, while I was on vacation he decided to purchase the house.

Q Did your company receive brokerage commission?

A Yes, we did.

Q And what was your next connection with that particular house?

A Around July, I believe of '71, Roy and Jane decided to sell the house and look for another one. So I showed them two homes. One they liked, which was a few blocks away on Oak Avenue and put this one on the market.

Now, because the other house -- the other house was being offered by a Mr. Darzo. He was purchasing another home in New Jersey and did not wish to sell his house to Roy and Jane Gebhardt, they had another house to sell.

So to accommodate the Gebhardts I had contracted to purchase the house from them simultaneously with their contract to buy Mr. Darzo's house.

Q In other words, Mr. Darzo did not want to make the sale of his house contingent to Gebhardt selling 351 Milton Avenue. Is that correct?

A Yes.

Q And you offered to purchase if from the Gebhardts?

A Yes.

Q And what would be the effect of that? What would it do to Mr. and Mrs. Gebhardt?

A It would guarantee a sale of their home on Milton Avenue so they could be free of their equity and move on to the new house.

Q When you say, "free of their equity" what do you mean by equity?

A They had approximately nine thousand dollars cash in the house above the existing mortgage at the price I paid, which was $33,500.00

Q And they could then use that cash in connection with the purchase of the house on Oak Avenue?

A That's correct, sir.

Q And could you describe the house on Oak Avenue, if you can recall?

A Yes.

It was a --

MR. AGULNICK: Objection to relevance on this,

your Honor.

THE COURT: I don't think it's particularly relevant, is it?

Q Was ita larger house?

A It was a larger house. That's their purpose of moving, sir.

Q Do you recall when it was that you signed the contract of sale to purchase the house at 351 Milton Avenue?

A It was July 27th, of '71.

Q And whatwas the sale price?

A I purchased the house for $33,500.00

Q That's 33 thousand five hundred dollars?

A That's correct, yes.

Q And were there any special terms in connection with that?

A That I was the real estate broker showing the property before closing and if a party came along wishing to purchase the house from me, I would sign the contract. However, I would close title on the property if they were getting pressed into a closing on the Oak Avenue property.

Q In other words, you were purchasing this house for resale is that correct?

A That's correct, resale, just to accommodate my

friend, frankly.

Q And did there come a time when there was a closing in connection with that house?

A Yes, November of '71.

Q And at that time you took title to the property. Is that correct?

A Yes, sir.

Q And was there a closing in connection with the Gebhardt's closing of the Oak Avenue house?

A On the same day, sir.

Q Did you make any efforts to sell or rent the house at 351 Milton Avenue?

A Yes, sir.

Q When did you first begin to make such efforts?

A Around the end of July when they decided they would move. I marketed the house by advertisements in local papers.

Q In other words, you made efforts before and after you took title to the house? Is that correct?

A Yes, correct.

Q Andcould you tell us what you did in connection with the marketing of the house?

A We advertised in the Staten Island Advance, the News and other papers, did some canvassing in the area to se

if the neighbors knew of buyers.

Q When you say canvassing, what do you mean by that?

A Going door to door and talking to whomever is willing to talk to you.

Q And what was the purpose of that?

A To determine if they knew of anyone who would like to live in the area, sometimes a cousin or relative or friend.

Q To live in which house?

A 351 Milton Avenue, sir.

Q Do you remember when you made this canvass of the area of Milton Avenue?

A It was after I owned the house. It was in Februrary, maybe January; January or February of '72.

Q And was there a broker -- withdrawn.

You took title to this house in your own name; is that correct?

A My own personal name, yes.

Q Was there a broker in connection with your efforts to sell the house?

A I was acting as my own broker.

Q Your company?

A Right.

MR. DE PETRIS: Your Honor, may I have this document marked as Government's exhibit 2 for identification?

THE CLERK: Document marked Government exhibit 2 for identification.

(So marked.)

Q Mr. Schlichtinger, I show you Government's exhibit 2 for identification and I ask you whether or not you can identify that exhibit?

A Yes, sir.

Q What can you identify it to be?

A It's a photocopy of various ads that my company placed for the property at Milton Avenue.

Q 351 Milton Avenue?

A Yes, sir.

Q In what newspapers were those particular ads placed?

A Staten Island Advance.

Q What period of time does that cover?

A From August of '71 to March of '72.

MR. DE PETRIS: Your Honor, I offer this exhibit in evidence.

THE COURT: Show it to counsel.

(Exhibit referred to is handed to defense

counsel.)

THE COURT: Any objection?

MR. CRECCA: No, sir.

THE COURT: Mark it in evidence.

THE CLERK: Government's 2 received in evidence.

Q Now, Mr. Schlichtinger, were you advertising to sell this house, to rent it with an option to buy, or what?

A Both, to sell and to rent, and to rent with an option to buy at various times.

Q And you say you took title to the property in November of1971?

A Yes.

Q And what -- what was the sales price that you were seeking at that time?

A It appears to be here. I don't have my glasses with me -- $36,900.00 -- yes, I do, excuse me.

Yes, $36,900.00

Q Did there come atime that you increased that sales price?

A Yes, it was.

Q And when was that?

A We had increased it in January to $37,500.00

Q And what was the reason for the increase?

A Expenses of carrying the house, primarily.

Q And what were those expenses generally?

A Principal, interest, taxes.

Q And those were expenses that you were paying?

A Yes, sir.

Imight interject that we were always open to an offer.

Q Now, during this period of time of 1971 and 1972 did you own any other single family houses?

A One house.

Q Did you own any other dwellings other than that one single family house?

A About three other dwellings; one two family and three two family.

Q And the rest of your real estate transactions were as a broker; is that correct?

A That's correct. These were the only transactions as a principal except for my office building which I own.

Q And during the period preceding April of 1972, approximately the 12 month period preceding that, can you tell us approximately how many real estate transactions you had through your company, Willow Creek Realty?

MR. CRECCA: Objection, Judge; certainly

immaterial.

THE COURT: I think it is, Mr. DePetris.

MR. DE PETRIS: I can explain at side bar, if your Honor wishes to hear me.

THE COURT: Re-read the question.

(The court reporter reads the pending question.)

MR. CRECCA. Objection, your Honor.

THE COURT: The 12 month period prior to --

MR. DE PETRIS: April of '72.

THE COURT: April of '72.

How many overall transactions?

MR. DE PETRIS: Yes, your Honor.

THE COURT: I will sustain the objection.

Go on to something more relevant.

MR. DE PETRIS: Your Honor, it has to do with the particular statute involved in this case and I would like to bring the section to your attention.

MR. AGULNICK: I object to comments being made here in front of the jury. I don't think it's called for.

THE COURT: I will listen to it. But statute or no statue, I don't see its relevance. The statute was in the book -- come up.

(The following takes place at the side bar outside the hearing of the jury.)

MR. DE PETRIS: Your Honor, under one of the statutory provisions involved in these cases, 42 United States Code Section 3631 as to count two, and that's based on certain provisions of 3604.

Now, those provisions don't apply to every dwelling. For instance, Section 3603 describes the application to various dwellings. And 36C2 is the relevant thing I was directing that question to. And it's simply laying the basis for the provisions of this statute to apply to this particular dwelling.

If he participated in certain real estate transactions he was a real estate broker during that period of time. That brings into play the applicability of the statute.

THE COURT: There is absolutely no doubt that --

MR. DE PETRIS: It's the dwelling, Judge. The statue only applies to certain dwellings, your Honor.

THE COURT: It says for the purposes of this subsection B a person shall be deemed to be in the

business of selling or renting dwellings if one or two. And there is no question about his being in the business of renting or selling dwellings.

MR. AGULNICK: We stipulated to thatfact.

MR. DE PETRIS: But this is an exception. Nothing in th s section 3604 will apply to it and it lists a single family house and it says provided, right here.

THE COURT: But he does --

MR. DE PETRIS: He only engages in that business if in the preceding twelve months --

THE COURT: It applies to brokers as well as principals. A broker is engaged in the business of selling or renting dwellings even if he does it for others.

MR. DE PETRIS: Yes, your Honor.

THE COURT: Yes, but there is no question about it.

MR. DE PETRIS: Yes. But until it's brought out in the evidence I haven't established that.

THE COURT: He has already brought out he is in the business of real estate and as a real estate agent there is no question that he is covered by

the statute. A real estate agent is just as deeply entrenched in the reach of that law as any private owner is.

MR. DE PETRIS: Yes. And they give a certain provision for being in the business.

And in order to be in the business you must have participated as an agent in two or more transactions. That has not come out.

THE COURT: But he has been in the business. I think he said something like ten years.

MR. DE PETRIS: 12 years, I believe

THE COURT: Ask him if he sold two or more houses and let it go at that.

If you want to ask him did he sell two or more houses prior to March of 1972 in that 12 month period, I will allow the answer. The way you went about it, it sounded to me we were going to go through a description of all sales in the prior 12 month period.

MR. DE PETRIS: I simply asked him 12 months.

(continued on next page)

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(Side bar conference continuing:)

MR. PETERSON: Just ask the question in the statutory terms.

MR. DE PETRIS: I don't understand the basis of the objection.

THE COURT: It was primarily relevant and its immaterial because ko me its so painfully clear that he is in the real estate business and subject to this law, that I would have no doubt in putting that to the jury on the basis of the testimony already in the record.

We are just accumulating unneeded material in my opinion. That is primarily my reason for agreeing with them that this inmaterial. It adds nothing.

MR. DE PETRIS: I am just protecting the record, your Honor. I would have to ask them to specifically waive --

THE COURT: But remember, remember that they have taken the position by their own objection that it's immaterial so they are not in any position to claim that they -- that you did not prove this. They prevented you from proving it.

MR. DE PETRIS: Only one attorney objected,

your Honor.

THE COURT: And I am ruling on the basis of his acknowledged business as a going real estate broker, he is in the business of renting and selling. There is no question about it and I don't understand -- I think we are going to get confusion at the conclusion of this case if we start to talk about the specific provisions that apply to a person who isn't even being charged.

Do you understand that?

MR. DE PETRIS: The jury need know nothing about it and the record must establish it. And only one attorney has objected to my qu4stion. But I am concerned on appeal.

THE COURT: If they had objected, I would say the record has established he is in the business of dealing in real estate.

MR. DE PETRIS: But it's not established in the preceding 12 months according to this statute and unless the defendants waive --

THE COURT: Are you suggesting in some way there is a defect in this record with respect to the particular house that the Charles Family wkas interested in, that somehow it's a house exempt from

from the law?

MR. DE PETRIS: Yes, your Honor. There are certain houses exempt from the law.

THE COURT: How can it be?

The law applies to persons.

MR. DE PETRIS: No, your Honor. The law applies to dwellings.

It sets forth particular dwellings that the statute applies to and there are particular exceptions to those dwellings. And one of the exceptions is single family houses, unless a real estate broker is involved in so many real estate transactions within the preceding 12 months. That's what I want to establish.

This is a single family house that --

THE COURT: Wait a minute. You're forgetting that I think -- it says provided after December of 1969 the sale or rental of any single family house shall be excepted from the application of this subsection only if it is a real estate agent or salesman here.

The testimony is perfectly clear he wasin the business of selling and renting.

MR. DE PETRIS: Yes, but there is a particular

proviso set forth in subsection C and I want to establish that the fact that he was in the business doesn't meet the definition unless you meet the specific statutory --

THE COURT: It says here about the advertisement listing and that whole sheet you put in the record is an advertisement of the sale of this particular house.

MR. DE PETRIS: That may be one way of establishing it.

THE COURT: I have been through so many of these cases that I am on solid ground where I can assure you there is no defect in this record. But to ease you, I will permit you to in quire as to whether he participated as an agent in the last 12 months. Because it's so clear to me that I think I am gilding the lilly here.

MR. GOGEL: Are you requiring that each of counsel at all times get up and chime in and recite the objection of the prior counsel?

THE COURT: If it's understood now that an objection by one is joined in by all, there will be no problem.

MR. GOGEL: That's all right with me. But

you should check with my co-counsel, otherwise it would be ridiculous to ask for a chime-in.

THE COURT: So to ease your mind I will allow you to ask him about in the preceding 12 months and we are talking about prior to April of '72.

MR. DE PETRIS: Yes.

THE COURT: Whether he had involvement as an agent in two or more transactions involving the sale or rental. That's all you got -- to me, that would solve your problem, which is a problem that I don't think really exists. I think we are wasting a hell of a lot of time on little things here.

MR. DE PETRIS: Yes. The answer could have been given and we could have resolved all this.

THE COURT: These people are not familiar with federal law.

MR. GOGEL: After speaking to my co-counsel, I agree one objection by all counsel is --

MR. CRECCA: No, I will not join in that in view of the position of my client and Mr. Peterson's client, we will voice our own objections, Judge. I think the proof will be somewhat different.

THE COURT: That's up to you. It's your case.

MR. CRECCA: Yes, Judge.

MR. GOGEL: As to the other defendants, your Honor, unless indicated differently, one objection would be as to all defendants.

THE COURT: I suggest you ask him as to the prior 12 months

MR. DE PETRIS: Yes.

(The following takes place in open court and in the presence of the jury.)

DIRECT EXAMINATION

BY MR. DE PETRIS CONTINUING:

Q Mr. Schlichtinger, within the preceding 12 months prior to April of 1972, as a real estate agent, how many transactions did you participate in approximately?

A Approximately 50, sir.

Q Now, sir, would you look at Government's exhibit 2 in evidence there.

A Yes.

Q And would you read to the jury the ad which you placed in the Staten Island Advance covering the period of March 3rd to March 6th, 1972.

A Yes.

Duplex with option, six rooms, one and a half baths, fenced rear yard, for rent with option to buy. $350.00

permonth, ten per cent of month going towards down payment; Willow Creek, 987-1010.

Q Prior to that time, had you had any success in renting or selling 351 Milton Avenue?

A A couple of calls but nothing concrete.

Q Did you get any response to that ad covering the period of March 3rd to March 6th, 1972?

A Yes, sir.

Q What was the response?

A The response was Mr. Charles, and on the evening of March 6th.

Q Did there come a time when you saw Mr. Charles?

A Yes, the morning of March 7th.

Q And who did you see at that time?

A I saw Mr. and Mrs. Charles and my sales associate, my salesman, Mr. Farris who had just come back from looking at the property at 351 Milton Avenue.

Q Mr. and Mrs. Charles had been shown the property by your salesman?

A That's correct.

Q And what is his name?

A Charles Farris.

MR. DE PETRIS: May I have this document marked as Government exhibit 3 for identification?

THE CLERK: Document marked Government exhibit 3 for identification.

(So marked.)

Q Mr. Schlichtinger, I show you Government exhibit 3 for identification and I ask you whether or not you could identify that exhibit?

A Yes, sir.

This is an offer to purchase 351 Milton Avenue made by Mr. and Mrs. Alberto Charles on March 7th, 1972.

Q That was the morning they had been shown the house; is that correct?

A That's correct, sir.

Q And does their signature appear on that exhibit?

A It does.

Q And does yours?

A Yes, it does.

Q And that is with respect to what house?

A 351 Milton Avenue, sir.

MR. DE PETRIS: Your Honor, I offer this exhibit in evidence.

THE COURT: Show it to counsel.

(Document handed to defense counsel.)

MR. FLAMHAFT: There is an objection by two counsel, your Honor.

(The following took place at the side bar out of the hearing of the jury.)

THE COURT: What is the objection?

MR. FLAMHAFT: Mr. Agulnick and Mr. Flamhaft object on the ground that this is not an original document.

MR. DE PETRIS: Your Honor, quite some time ago I sent a letter to all of defense counsel advising them of the various exhibits that will be offered in evidence and they were available at any time for inspection. All of these objections should have been at the pre-trial hearing by April 5th or 6th, whenever it was, of this year.

I don't understand the objection now. Is he contesting the authenticity of the document?

MR. FLAMHAFT: I am only making the objection for the purposes for which they were made. I am sure at the time of the trial is the proper time before the introduction of any exhibit when the objection is made.

MR. DE PETRIS: We try to resolve these things ahead of time in federal court and that was the purpose of putting you on notice.

MR. AGULNICK: You gave us a notice with the

items you intended to offer in evidence, specifically photographs. And you never mentioned this.

MR. DE PETRIS: Do you want me to get the letter?

MR. AGULNICK: Yes.

MR. DE PETRIS: If your Honor would give me a minute I will get the letter where I advised the defense counsel.

THE COURT: You get it. Go ahead.

MR. DE PETRIS: I believe Rule 1002, your Honor.

THE COURT: I believe it's 901, really.

So what you do is you go back and ask him if youre not satisfied here, was this typed up in his office. And if he can tell from the observation -- looking at it --

MR. GOGEL: Is this a foundation to be laid for Mr. De Petris by your Honor?

THE COURT: Well, your objection seems to be an attack that it is a copy and not an original.

However, it seems to appear to be a carbon copy and if you ask him was it the practice to make up a typed original and a carbon copy and to sign both and to give the carbon to the homeowner or to keep the

carbon, or to keep the original, I have to overrule the objection.

MR. GOGEL: But, your Honor, I most respectfully object now to the Court telling the U.S. attorney the proper foundation for putting it in evidence because you overruled my objection.

THE COURT: You must understand, we do not allow any longer so-called rules of law to prevent facts that are perfectly relevant and probative from getting to the jury. We are operating in this court under the Uniform Rules of Evidence which have become the prescribed mode here.

MR. GOGEL: The Uniformed Rules are not --

THE COURT: You will be surprised what the Uniformed Rules have done to the rules of evidence.

MR. GOGEL: I object to the Judge telling the U.S. Attorney the proper language.

MR. DE PETRIS: I call defense counsel's attention to 1003 of the Rules of Evidence which provide that a duplicate is admissible to the same extent as an original, unless, one, a genuine question is raised as to the authenticity of the original, and three, unless the --

MR. FLAMHAFT: I will withdraw my objection,

your Honor.

THE COURT: Okay.

MR. DE PETRIS: I have the letter here also.

(The following takes place in open court and in the presence of the jury.)

THE COURT: I understand the objection was withdraw?

MR. FLAMHAFT: Yes.

THE COURT: Mark it in evidence.

THE CLERK: Government's exhibit 3 received in evidence.

(So marked)

DIRECT EXAMINATION

BY MR. DE PETRIS CONTINUING:

Q Mr. Schlichtinger, can you tell the jury what the terms of that agreement are?

A Yes, sir.

The purchase price was $37,500.00, subject to purchaser, Mr. Charles receiving a mortgage commitment in the amount of $33,750.00.

Q What percentage is that, approximately, the mortgage?

A About a 90 percent of the purchase price, approximately.

Q Did you have a conversation with the Charleses about a 90 percent mortgage?

A Yes.

I informed Mr. and Mrs. Charles that I believed they wouldn't achieve that mortage committment, I told them.

Q 90 percent?

A Yes.

However, they were adamant in trying and they had a friend at a bank and they were off to get the mortgage committment.

Q And was there an agreement which you provided for the real estate broker commission?

A Yes, the agreement was Willow Creek Realty brought about the sale and they will receive a commission as pre-agreed.

Q And thereafter that March 1972 date when that document was signed, did the Charleses make efforts to obtain such a mortgage committment?

A Yes, sir, they did.

(continued on next page)

DIRECT EXAMINATION

BY MR. DE PETRIS CONTINUING:

Q And as of early April, 1972, were they successful in those efforts?

A No, they were not. They went to a local bank, Community National, who in turn referred them to another bank the Northfield Savings and Loan Association and then there was an inspector sent to the property and looked at the property and refused to grant a loan of this amount.

Q Involving the 90 percent?

A Right.

Q And did there come atime you again saw the Charleses?

A Yes, sir.

Q And when was that?

A It was about April 6th.

Q Of 1972?

A Of '72, sir.

Q Did you have a conversation with them at that time?

A Yes. They said that --

Q Where did this conversation take place?

A I'm sorry, the conversation took place in my office. They came to my office.

Q And who was present?

A Myself, my secretary and Mr. and Mrs. Charles.

MR. DE PETRIS: Your Honor, may I have this document marked for identification as Government exhibit 4 and 4A ? There are two documents there.

THE CLERK: Document dated April 6, 1972, marked Government exhibit 4.

Document dated April 17th, 1972, marked Government exhibit 4A for identification.

(So marked.)

Q Now, Mr. Schlichtinger, you said you had a conversation with the Charleses on April 6th, 1972? What was the substance of that conversation?

A They had informed me that they would like to rent the house as per the ad in March and purchase it at a later time. So the --

Q The ad you had advertised for rental with the option to buy?

A That's correct.

Q Did you reach another agreement on that date?

A Yes, we did, sir.

Q I show you Government exhibit 4 for identification and ask you whether or not you can identify that document?

A This was the agreement by which Mr. and Mrs.

Charles were to rent the propery at 351 Milton Avenue.

Q Did you each sign that agreement on April 7th, 1972?

A Yes, we did, sir.

Q Do each of your signatures appear on that document?

A They do.

Q And can you identify Government exhibit 4A for identification?

A Yes.

Q What do you identify that to be?

A The check that Mr. Charles wrote for the amount of $650.00 as security, which represents security and one month's rent

Q Is that a copy of the check?

A It's a photocopy, I'm sorry.

Q And was that check given to you?

A Yes, it was.

Q On what date?

A On April 6th. It's dated April 17th.

Q It was post dated. Is that correct?

A Yes, it was.

MR. DE PETRIS: Your Honor, I offer in evidence Government exhibit 4 and 4A.

(Documents handed to defense counsel.)

MR. PETERSON: Your Honor, may we have a short voir dire?

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MR. PETERSON:

Q Mr. Schlictinger, with reference to the check that was given to you by the Charleses, there is nothing in this document to reflect that it was in fact negotiated, am I correct, as you look at this check?

A That's correct.

MR. PETERSON: No further questions, Judge -- just one.

Q Was it in fact negotiated or was there a stop order placed on the check?

A It was negotiated at a later date after a fire and there were insufficient funds.

Q Insufficient funds.

MR. PETERSON: Thank you very much.

MR. DE PETRIS: Any objection to this?

MR. GOGEL: May I see it?

(Document handed to counsel.)

MR. DE PETRIS: May I offer it in evidence, your Honor, as Government exhibit 4 and 4a?

THE COURT: Mark it in evidence.

THE CLERK: Government exhibit --

MR. CRECCA: May we approach, please?

THE COURT: Let the clerk do one thing at a time, please.

MR. CRECCA: Yes.

THE CLERK: Government exhibit 4 and 4A received in evidence.

(So marked.)

MR. DE PETRIS: I'm sorry, your Honor, did defense counsel have an application?

MR. PETERSON: Yes, Judge.

MR. CRECCA: Yes.

(The following takes place at the side bar and out of the hearing of the jury.)

MR. PETERSON: At this time, Judge, I move to dismiss substantive counts as a result of the fact that this check does not reflect any consideration. There was no legal agreement to rent or purchase. We think that under the law there must have been some sort of agreement, a formal agreement between buyer and the seller in order for the substantive counts to hold in order to be binding.

Willow Creek Realty has taken upon itself to

further negotiate the sale of those premises to a third party because of the fact that a check bounced. And in fact, the Charles family made no real attempt to enter into those premises legally as to be shown by a bounced check.

MR. CRECCA: And I desire to point out for the record pursuant to my understanding of the Penal Law of the State of New York, the issuance of a check wherein it bounces for insufficient funds, it is not only for a lack of consideration, but also, to my understanding, it's a crime. I want the record to so reflect and I would ask the Court to take judicial notice of the Penal statutes of the State of New York.

THE COURT: Well, I am going to deny your respective applications and you have an exception.

MR. PETERSON: Thank you.

MR. GOGEL: The defendant Vivelo joins in that application.

THE COURT: Also, the next time counsel wants a voir dire --

MR. DE PETRIS: Yes, that was cross examination and I was about to --

THE COURT: And you represented to the Court

you wanted a voir dire and you know the purpose of a voir dire, to show the genuiness. And in my opinion you turned that into advance cross examination.

MR. PETERSON: I apologize to the Court, but this check on its face was introduced as being a negotiated instrument.

THE COURT: You were the one who brought out the negotiation. It was offered as a deposit.

MR. PETERSON: On its face it was misrepresented. It was stated that it was a deposit and --

MR. DE PETRIS: I haven't even started to examine the witness on it.

THE COURT: We will never make progress if every five minutes we are up here at the side bar.

And I am certainly willing to entertain a serious objection, but I think that was certainly out of order. And I am calling it to your attention for that reason and I hope it doesn't happen again.

MR. PETERSON: I apologize.

THE COURT: And at this point an view of the hour, I will break off and we will resume at ten o'clock tomorrow morning.

MR. DE PETRIS: I would like to state one other thing, your Honor.

I provided as part of the discovery information that these documents were available for inspection The purpose of doing that is so we don't have these interruptions at trial. And I still stand by that and if defense counsel would like to come by my office they can still go over them.

MR. GOGEL: It was a misunders[illegible]ng at the very best, as to documents being offered into evidence.

THE COURT: You didn't understand documents were going to be offered?

MR. GOGEL: Certain documents were forwarded to us.

THE COURT: You haven't seen this?

MR. GOGEL: No, I haven't, not this particular document.

THE COURT: Counsel says he did make a list of documents in any rate and you could ask for it and you say you furnished these documents?

MR. DE PETRIS: They ask for an opportunity to inspect and the Government took the exhibits which were to be introduced in evidence and I wrote them and told them all the exhibits we were going to introduce

in evidence were available for inspection at their convenience.

MR. PETERSON: Assuming that was true, we still have a right to review any documents he is to offer into evidence.

THE COURT: At trial? If you're given advance notice that documents are available and you don't avail yourself --

MR. AGULNICK: I went over to see Mr. DePetris and he never offered me any document, to see any document.

MR. DE PETRIS: Do you want me to show you the letter, Mr. Agulnick?

THE COURT: Well, there is still a pending invitation to inspect. Because I will not entertain kindly objections as to authenticity of documents and I will not again like a voir dire turning into cross.

(The following takes place in open court and in the presence of the jury.)

THE COURT: Members of the jury, we will recess again until tomorrow morning at ten a.m.

In the meanwhile, don't let anybody call your attention to the fact that you are sitting on

case that is perhaps reported in the newspapers. Just thank them for the information and tell them, "No thanks."

So I would expect you not to talk about it.

I see many of you carry newspapers. I can't forbid you to read or buy newspapers, but I implore you not to let your minds be confused with what you read about the case. I can't emphasize that too strongly. You must listen to what you hear in court under oath and from the witness stand.

Please understand that.

(The jury leaves the courtroom.)

(Case on trial adjourned until ten o'clock a.m., Wednesday, May 12, 1976.)

I N D E X

WITNESS	DIRECT	VOIR DIRE
SCHLICHTINGER	64	105

E X H I B I T S

GOVERNMENT	DESCRIPTION	ID.	EV.
# 1	chart		74
# 2	document	82	83
# 3	document	96	100
# 4	document	103	106
# 4F	document	103	106

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THE CLERK: United States of America against Anzalone et al.

THE COURT: Do I understand there are applications or other matters?

MR. DE PETRIS: There are a couple of things which I would like to bring to your Honor's attention.

THE COURT: Yes.

MR. DE PETRIS: The F.B.I. had taken some aerial photographs of the area and I've shown them to defense counsel and I think we have agreed that they are a fair and accurate representations of what they purport to depict and we would put them in evidence at this time, so there would be nothing misleading about the chart.

MR. CRECCA: Judge, of course the defendant Barbiero, and I am sure that my colleagues join in the application. I still request the jurors to be taken to the scene in that these pictures do not show the depth or proper perspective of what I claim to be, I am one hundred per cent familiar with this area, being born and raised in this particular locale. Again, having revisted the particular area the other day I think in fairness to the accused, in fairness to the Government, that this jury, to repeat and reiterate, be taken to the scene to show the exact proximity of dwelling to dwelling. If not, Judge, I believe it would be highly

prejudicial to the defendants in this case.

THE COURT: Well, I have your application in mind and under consideration. I would like, however, to hear a little more of the case before coming to a decision regarding it.

MR. CRECCA: In fact I wish to point out the photographs do not indicate what I had previously stated as to the recess of one of the persons who was considered to be an uninvited co-conspirator. That is Mr. Maddalone, you just do not see it.

MR. DE PETRIS: There is a photograph that does depict it. It has to be resolved at a later time.

MR. CRECCA: Again, to repeat, I desire my statement to stand and the request to stand.

THE COURT: We will consider it as a pending application.

MR. CRECCA: Yes, sir.

THE COURT: What do you propose to do?

MR. DE PETRIS: I propose to mark them in evidence.

THE COURT: Is there any objection?

MR. DE PETRIS: I understand there is none.

THE COURT: Have them marked.

MR. DE PETRIS: May we have these marked Exhibits 10, 10-A and 10-B. I have a list of the other

exhibits and I have them numbered through nine.

THE COURT: I would like to keep the exhibits in order.

MR. DE PETRIS: I can mark the other exhibits at this time also. That may speed up the process during trial.

THE COURT: Yes.

MR. DE PETRIS: I would ask that the document be marked as Government's Exhibit 5 for identification. It is a naturalization certificate of Mr. Charles.

THE CLERK: Photograph marked Government's Exhibit 5 for identification.

(So marked.)

MR. DE PETRIS: May I have these two photographs marked as Government's Exhibits 6 and 6A. They are photographs of 351 Milton Avenue. They do show the recess entrance at 351 Milton Avenue. I am not sure that is what Mr. Crecca was getting at, but they do show it.

At this time, your Honor, I would just ask that these two photographs be marked as Government's Exhibits 6 and 6A for identification.

THE COURT: Isn't there a stamp on the back of that already?

MR. DE PETRIS: This particular photograph was

a Grand Jury exhibit. I was going to suggest we put our sticker on top of that.

MR. CRECCA: Judge, I understand that our worthy adversary desires and will attempt to introduce these photographs into evidence and I say by the very nature of the fact -- and I don't mean to be playing with the Court with this comment, by the very nature of the fact there is an American flag stuck on the front lawn of 351 and 349 Milton Avenue. I would say that would be prejudicial to the accused. That is the house that was damaged, 351 or 349, I don't know.

MR. DE PETRIS: Who is it?

MR. CRECCA: Blazer.

MR. DE PETRIS: I'm not offering them at this time. I just ask they be marked for identification.

THE COURT: Yes.

MR. CRECCA: In fact, Judge, I think it is common knowledge, based upon the testimony that has been submitted, the prior testimony, that the flag was placed there by Mr. Charles. Isn't that correct, Mr. DePetris?

MR. DE PETRIS: That is my understanding. It can of course be brought out at the trial. Those are the photographs that were taken right after the fire and they are the only photographs we have of the house at

that time.

THE COURT: It also appears to be in front of 349 --

MR. CRECCA: Regardless, I think it is prejudicial and inflammatory and that is the basis of my objection as far as Mr. Barbiero is concerned. I don't know about my colleagues.

MR. AGULNICK: I join in that, your HOnor. I think it is unnecessary.

THE COURT: I am not going to rule them out now. The Government is merely marking them for identification at this time.

THE CLERK: Black and white photographs marked Government's Exhibits 6 and 6A for identification.

(So marked.)

THE COURT: It's really 351 and 349, right?

MR. CRECCA: Conceded. The flag was placed there by Mr. Charles. It is conceded by the Government also.

THE COURT: I don't know.

MR. DE PETRIS: That is my understanding but Charles will be the next witness.

THE COURT: Are you going to talk about the American flag?

MR. DE PETRIS: If defense counsel wants to,

I am not going to.

THE COURT: We have on here. They can look at that.

MR. DE PETRIS: If defense counsel wants to --

MR. CRECCA: You have thephotographs, sir.

MR. DE PETRIS: I would have this photograph marked as Government's Exhibit 7 for identification. It is a photograph of a can.

THE CLERK: Black and white photograph marked Government's Exhibit 7 for identification.

(So marked.)

MR. CRECCA: I want to be expeditious and not to impose on the judge, as the judge pointed out yesterday.

MR. DE PETRIS: May we have these two photographs marked as Government's Exhibits 8, 8A and 8B for identification.

THE CLERK: Black and white photographs marked as 8, 8A, 8B for identification.

(So marked.)

THE COURT: Those are the interior photographs?

MR. DE PETRIS: These are the photographs which I produced at the hearing on April 5th.

THE COURT: We have 8, 8A and 8B, three in that series?

MR. DE PETRIS: Right.

MR. GOGEL: In addition to the photographs, there is a typewritten matter on the front. I think that matter should be exised from the photograph.

THE COURT: May I see it?

MR. DE PETRIS: Again, I don't mean to delay the trial now, by having the objections. All the typed matter says is what the photograph is.

THE COURT: Right. Well, I think I would deny your application under the circumstances. I see it merely adds identifying it. If there is any question about it, we can settle it if that should be raised. I'm sure there'll be testimony as to the numbers of what the respective houses are in reverse.

MR. DE PETRIS: Your Honor, I would offer Government's Exhibit 9 for identification. It would be the tape of the --

THE COURT: The telephone tape, is that what it is?

MR. DE PETRIS: Yes, your Honor.

THE COURT: I have a copy here. You have a copy? Are you marking the tape itself, is that it?

MR. DE PETRIS: The tape would be 9 and the transcript would be 9A, your Honor.

THE COURT: Yes.

MR. PETERSON: Should we voice our objections now or later?

THE COURT: I would say later. Let's see what happens.

MR. CRECCA: Thank you, Judge.

THE CLERK: Cassette marked Government's Exhibit 9 for identification.

Three page transcript marked Government's Exhibit 9A for identification.

(So marked.)

MR. DE PETRIS: Your Honor, then I would ask the three aerial photographs, those photographs that I mentioned before be marked as Government's Exhibits 10, 10A and 10B.

THE COURT: Three more did you say?

MR. DE PETRIS: These are the ones I spoke about before which there is no objection to and I ask that these be marked right in evidence.

THE COURT: Yes.

THE CLERK: Three black and white photographs received in evidence as Government's Exhibits 10, 10A, 10B.

(So marked.)

THE COURT: Are we ready to call the jury in?

MR. DE PETRIS: One other item, your Honor.

After the Court adjourned yesterday, Mr. Schlichtinger advised me he thought he still had the original of that check. So I asked him to please check his records last night and see if he could locate it. He did and he does have it.

I have shown it to defense counsel and I believe there is an agreement we should substitute this, which is 4-A, for the copy of the check.

THE COURT: Well, then put a sticker on that. Maybe it will not be necessary. Do you want to attach it to the other exhibit?

MR. DE PETRIS: It is not necessary now, if we could just mark it 4-A.

THE COURT: Yes.

MR. DE PETRIS: That would be 4-A in evidence.

THE CLERK: Original check, received in evidence as Government's Exhibit 4-A.

(So marked.)

THE COURT: Is your witness available to get on the stand?

MR. DE PETRIS: Yes. The agent is getting him right now from the witness room.

THE COURT: All right.

MR. DE PETRIS: I think we can bring the jury in and if your Honor wants to show them these photographs

A1

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-against-

ALBERT ANZALONE, ANTHONY VIVELO, NICOLAS LOMBARDI, ROBERT BARBIERO,

Defendants.

75-CR-751

----------x

United States Courthouse
Brooklyn, New York

May 13, 1976
10:00 o'clock A.M.

B e f o r e :

HONORABLE EDWARD R. NEAHER, U.S.D.J.

HARRY RAPAPORT
ACTING OFFICIAL COURT REPORTER

A2

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New YOrk

BY: RONALD DE PETRIS, ESQ.
Assistant U.S. Attorney

BARRY AGULNICK, ESQ.
Attorney for Defendant Anzalone

WILLIAM GOGEL, ESQ.
Attorney for Defendant Vivelo

STEPHEN FLAMHAFT, ESQ.
Attorney for Defendant Lombardi

ANTHONY J. CRECCA, ESQ.
-and-
DENNIS PETERSON, ESQ.
Attorneys for Defendant Barbieri

A3

THE COURT: Any matters to be brought up?

MR. DEPETRIS: I have just two brief matters. Here is a re-typed copy of page three of the indictment, the statutory section removed --

THE COURT: Fine.

MR. DEPETRIS: This is the original and a copy.

THE COURT: Fine.

MR. DEPETRIS: I will hand them both up to the Court.

THE COURT: All right.

MR. DEPETRIS: Also I understand -- Gary Woodfield spoke to me last night and indicated that he had a hearing before your Honor tomorrow afternoon at two o'clock.

I was wondering whether witnesses should be brought in and how many witnesses I should have here tomorrow and whether or not your Honor intends to sit tomorrow afternoon.

Mr. Woodfield understands that if the hearing goes forward it probably will take a couple hours.

THE COURT: I will let you know as soon as possible

MR. DEPETRIS: Fine.

THE COURT: We will have to see how many witnesses he has.

MR. AGULNICK: Your Honor, I have an application

at this time. The next witness that the government intends to produce at this trial is one Durell Charles. I read all the 3500 material in regard to this witness and I would ask at this time for an offer of proof for the following reasons, what Mr. Charles has to say does not bear one iota on the actions of our respective clients. He has nothing to say and doesn't identify ay of our clients. All he can say is the house burned own and there were bee-bees shot through the windows ad there was vandalism. This is all based on hearsay, ot having witnessed or seen any of the matters.

I suspect the government intends to go into introctory examination in which they will go into the ngthy educational and occupational background of this tness and I submit to the Court that the only purpose at this witness could serve is to artificially engenr sympathy for the government's case before the jury d and her testimony has no probative value as far s the case is concerned.

your Honor characterized Charles' testimony as ot having any bearing --

THE COURT: i didn't say not having any bearing --

MR. AGULNICK: With regard to the actions of our lients for the most part.

MR. DEPETRIS: I intend to be only brief with Mrs.

Charles. I do think she is a relevant background witness, but I will be very brief with her. I won't go into detail that was done before --

THE COURT: She went through the house and saw certain things, is that it?

MR. DEPETRIS: That is correct, your Honor.

MR. AGULNICK: Your Honor, there is no controversy that there were windows broken and there was a fire in the house and one day there was a flood. There is never going to be any controversy as to those facts. I don't think she is a necessary witness. I think the Government is facing a scenario here to influence the jury.

I submit if Mrs. Charles is called as a witness, if there is anything in the way of hearsy, I will object at every point that I don't want to hold up this trial but she is essentially a hearsay witness.

THE COURT: Of course, you will avoid questions that you know will produce hearsay.

MR. DEPETRIS: Yes, your Honor.

THE COURT: I think, however, she is in effect one of those who entered into the rental of the house in question and therefore since the Government has the burden of proving that what occurred here was solely because of color or race, there is somerelevanve to the background and education and things like that.

Do you understand? There would be. that is what the' statute is all about.

MR. AGULNICK: The statute doesn't speak about educational background.

THE COURT: Exclusion solely on the ground of color or race.

MR. AGULNICK: Number one, she's not a citizen of the United States so it doesn't apply there --

THE COURT: She is not?

MR. DEPETRIS: No, but count two of the indictment, that particular statute does not require anyone be a citizen. Only count one.

MR. AGULNICK: Secondly, if your Honor is suggesting a character is initial and her background is initial as to what type of person, then I ask the Court why we were thwarted in our effort with regard to Mrs. Charles' character.

THE COURT: I don't mean to imply that even bad character would justify the acts, you understand, if they were done. I am not saying that. I do think the Government has the burden of bringing the case within the literal terms of the statutes that are applicable.

So I think there is relevance to her appearance here, but I do ask the Government to avoid asking questions which apply to hearsay.

A7

I don't know what the witness proposes to testify to, I certainly wouldn't rule out as a matter of law that the Government should not put her on. I know the statute is aimed to protect blacks, or non-whites, or people who are not of a national origin of the United States.

MR. AGULNICK: I am asking for an offer of proof from the Government as to essentially what they intend to prove. Right now you would be ruling in a vacuum.

THE COURT: Generally, aside from putting her on, she was a co-signer?

MR. DEPETRIS: Yes. What I intend to briefly go into is her education and employment and into the fact that -- I am not going to go into detail as I did with Mr. Charles -- then bring out the fact that she was looking for a house in '71 and '72 and the two agreements that were signed and I think the three occasions she went to the house. The first day she got the keys and the house was in good condition. She went back the next day with two of her friends -- This is a new fact -- and saw the windows broken. the next time she went to the house was the day before the fire and the day of the fire and that will be it.

THE COURT: Seems reasonable to me.

MR. AGULNICK: I take exception. I won't dwell

on it.

MR. FLAMHAFT: I am asking for a personal accommodation from the Court. I would like to know if the Court will permit me to leave at 12:30 today. I hate to cut the trial short. I have spoken to the Government about it --

THE COURT: In other words, you want me to suspend at 12:30?

MR. FLAMHAFT: If possible.

THE COURT: You weren't able to make any other arrangement?

MR. FLAMHAFT: No.

THE COURT: Reluctantly.

MR. FLAMHAFT: I am asking for it reluctantly, as well.

THE COURT: All right. Let's see how we can get along.

MR. FLAMHAFT: Thank you, your Honor.

THE COURT: Anything else?

MR. DEPETRIS: The Government calls Mrs. Durrell Charles.

THE COURT: Bring in the jury.

(Jury seated in jury box.)

THE FOREMAN: Your Honor, some of the jurors would like to have the defendants identify themselves

at the start of the day.

THE COURT: All right. I will request that.

Will Counsel ask the defendants to rise and state their names?

MR. CRECCA: The gentleman to my left is Robert Barbieri.

THE COURT: Mr. Gogel.

MR. GOGEL: This is Anthony Vivelo.

MR. AGULNICK: Albert Anzalone.

MR. FLAMHAFT: This is Nicholas Lombardi.

Before we commence with the witness, can we come up for a second?

(The following took place at the side bar.)

MR. AGULNICK: I don't mean to interrupt the proceedings, but yesterday afternoon there was a circumstance late in the day where a juror appeared to me was making notes with regard to the charges.

THE COURT: We discussed that.

MR. AGULNICK: I don't know if anyone was taking notes during the course of the testimony here. I would ask the Court to admonish the juror not to take notes.

THE COURT: No, I won't do that. I told you what I will do. I will prohibit any juror taking the notes in the jury room. That's all I will do.

MR. AGULNICK: that particular juror who takes

notes, I ask your Honor to admonish him not to show the notes to any of the jurors or discuss the notes with any of the jurors.

THE COURT: All right.

(The following took place in open court.)

THE COURT: Members of the jury, Counsel has made a request which will be granted. If any juror is taking notes during the course of the trial testimony, those notes are to be for that juror's personal use and not to be exhibited to other jurors or discussed with other jurors. You are not to discuss the case among yourselves at this time. You are simply to listen to the evidence. As I have said, the discussion does not occur until after the case is submitted to you, that is after you have heard the instructions on the law as well as the evidence.

I simply remind you I do not prohibit note-taking. But they are not to be discussed or exhibited to other jurors.

In fact, at the end of the case they are not to be taken into the jury room. The only things that may be taken into the jury room are exhibits.

When testimony is required to be read back, that will be done in open court.

All right, now, have you got your witness ready?

All

MR. DEPETRIS: Yes, your Honor.

THE COURT: Swear the witness.

D O R R E L L M A R Y C H A R L E S , a witness on behalf of the United States of America, was sworn by the Clerk of the Court and testified as follows:

DIRECT EXAMINATION BY

MR. DEPETRIS:

Q State your name for the jury.

A Dorrell Mary Charles.

Q Mrs. Charles, how old are you?

A 43.

Q Where do you live?

A 417 Neck Avenue, Concorde, on Staten Island.

Q Are you married?

A Yes.

Q When were you married?

A 1956.

Q What is your husband's name?

A Alberto.

Q Mrs. Charles, where were you born?

A Port of Prince, Trinidad in the West Indies.

Q Did there come a time when you came to the United States?

A yes.

Q Approximately when was that?

A In 1957.

Q Could you briefly describe to us what your educational background is?

A I have a high school diploma, Bachelor of Psychology from Richmond College; post-graduate work at Princeton University and into a Masters program at Fordham University.

Q What type of degree did you get from Richmond?

A Bachelor of Arts degree.

Q In what?

A Psychology.

Q What sort of degree are you working towards now?

A A degree in social work with major parts of my work in administration and policy-making.

Q Are you currently employed?

A Yes, by the New York State Division of Youths.

Q How long have you been so employed?

A About three years.

(continued next page)

Q In what capacity are you employed?

THE COURT: I wonder if you can speak into the microphone so we can all hear you.

A I am the Assistant Director of a 20-bed facility based on Staten Island.

Q When you say 20-bed facility, what sort of facility is that?

A A facility for troubled adolescent girls who come to us from the court in need of supervision. They live with us in a short treatment program from six months to a year.

Q What are your duties --

MR. AGULNICK: May we have a sidebar conference at this point?

THE COURT: I don't think it's necessary to go into that.

Q Do you have any children, Mrs. Charles?

A Yes, three.

Q How old are they?

A We have a daughter who is 18, we have a 16-year old son, almost 17, and an 11-year old son, almost 12.

Q Are they in school?

A Yes, my daughter is a junior at Nathaniel Hawthorne --

MR. AGULNICK: I object to this as irrelevant. Again I ask for a side bar.

THE COURT: No, I overrule that objection. Limit it, please.

MR. DE PETRIS: Yes, your Honor, this is my last question as to background.

Q You may answer the question.

A My daughter is a junior at Nathaniel Hawthorne College in New Hampshire. My son is a junior at Xavier Military Academy in the City; and the 11-year old is a sixth-grader at St. Sylvester's Parochial School.

Q I direct your attention to the years 1971 and 1972, were you looking for a house during that period of time?

A Yes, we started to look for a house the middle of '71.

Q Where?

A On Staten Island.

Q As of early March 1972, were you able to locate a house which you liked?

A Yes.

Q When did you locate that?

A I'm sorry?

Q When did you locate that?

A On March 6th I believe is the date we saw an ad in the Staten Island Advance, rent with option to buy. It did not say the location.

We went to the realty company and they took us to see the house.

Q Prior to that time, in March '72, had you had any luck in finding a house you liked?

A No, many houses but none that we liked.

Q I show you Government's Exhibit 2 in Evidence and I ask you whether or not the ad which you saw which you just referred to appears on that document.

A That is the ad.

Q Did you respond to that ad?

A Yes.

Q What did you do?

A They made an appointment with us to take us to see the house.

Q Where was the house located?

A In New Dorp, Oakwood.

Q On Staten Island?

A Yes.

Q What was the address?

A 351 Milton Avenue.

Q Would you point out the house on Government's

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Exhibit 1 in Evidence, the chart?

A Yes.

Q You may resume the witness stand.

When was the date on which you saw the house?

A I am not sure we saw it on that day, I think we saw it two days, the 6th and 7th.

Q Did there come a time when you reached an agreement in connection with that house?

A Right.

Q I show you Government's Exhibit 3 in Evidence and ask you whether or not you recognize that document?

A Yes.

Q Does your signature appear on that document?

A It does.

Q What is that document?

A I think it's called a binder. We wanted to rent the house with an option to buy it. It states the price of the house.

Q What was the price?

A $37,500.

Q That is the sales price?

A Yes. Negotiable, it said.

Q Thereafter, did you make efforts to obtain a mortgage commitment?

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A Yes.

Q Early April 1972, were any of those efforts successful?

A No.

Q I show you Government's Exhibit 4 in Evidence and I ask you whether or not you recognize that document.

A Yes, I do.

Q Does your signature appear on that document?

A Yes.

Q What is that document?

A I am not sure what it is called, it is a document that gives access to the house and to the keys.

Q Is that an agreement you reached?

A Yes, with Carl Schlittlinger, the landlord.

Q What was the date you entered into the agreement?

A April 6th.

Q Of what year?

A 1972.

Q Can you tell us what happened on that day after you signed this rental agreement?

A Yes, we went to the house. I went to the house with two women from one of my classes.

Q Mrs. Charles, when did you receive the keys to the house?

A On the day we received the keys my husband and I went to the house.

Q What date was that?

A April 6th.

Q The date you signed the agreement?

A Yes.

Q Would you tell us what happened when you went to the house on that day?

A We looked around the house. We didn't see anyone on the block at all. The blinds went up and down a couple of times but we didn't see any people.

Q What condition was the house on that day?

A Very good condition.

Q Did there come a time when you again went to the house?

A The very next day, April 7th.

Q How did you go to the house?

A Two women from one of my classes --

Q Classes where?

A At the time, I think they came from Community. Staten Island Community.

Q At that time, were you in school?

A Yes.

Q Which school was that?

A In April of '72, already at Richmond College.

Q Would you tell us what happened when you went to the house on that day?

A When we drove up one of the other women recognized there was something wrong with the house before I did.

MR. AGULNICK: Objection to what a woman recognized.

THE COURT: Sustained.

What you saw.

Q Tell us what you saw.

A There was paint splashed on the door, windows had been knocked out there were little holes in the windows.

Q Did you observe anything else on that day?

A The house right next door to it, there was a man holding on to a dog. We turned right around and went back to the car.

Q When you say the house next door, would you identify the house? Could you identify that house on the chart?

A The house right next door, 355.

Q 355 Milton Avenue?

A Yes.

MR. DE PETRIS: May I say for the record the resident of that house is Mr. Gerald Maddalone.

Q When was the next time you went to the house?

A The very next day we went back to the house with my husband so that he could see what had been done to the house.

Q You observed the house at that time?

A Did -- I'm sorry?

Q What did you do on that day?

A Went into the house. This time I think there were more than one neighbor outside. The same people who came out holding the dog on the leash and another man across the street up against his door with a dog. I don't remember what kind of dog it was.

Q After that date, when was the next time you went back to the house?

A I didn't go back to the house until the 21st of April. We were supposed to move in that day.

Q What day of the week was that?

A A Friday.

Q Would you tell us what happened on that day?

A I don't remember too much of what happened. We were supposed to move in. There was some problem with the movers who said it was too late to get the truck packed to take to the house and we took some things in there, pots and pans.

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Q When you say we --

A My husband and there was people from the Interracial Council, I don't remember how many.

Q You took items in the house?

A Linens, mostly linens and brooms and stuff to clean.

Q I show you Government's Exhibit 7 for Identification and I ask you whether or not that was one of the items you took in the house on that day.

A Absolutely not. That was not in the house on Friday.

Q To your knowledge?

A Not to my knowledge.

MR. FLAMHAFT: I think it would be wise to have the witness identify what was not in the house.

MR. DE PETRIS: Government's Exhibit 7 for Identification.

MR. FLAMHAFT: You want to leave it that way, just the exhibit?

THE COURT: I think counsel's point is the exhibit is the photograph but it is a photograph of an object and it isn't too clear from the witness' answer -- I take it that she wasn't referring to the photograph, rather to the object in the photograph.

Q I ask you whether or not this was in the house. I am referring to the object in this photograph. Is that what you are referring to also?

A Yes. I am looking at a can. It looks like part of a can. I am saying that can was not in the house on the Friday I was there.

MR. DE PETRIS: I would offer this exhibit in evidence at this time, subject to later connection.

THE COURT: All right. Any objection?

MR.AGULNICK: I have an objection to it, your Honor.

MR. DE PETRIS: I will hold it until a later time.

Q Do you recall approximately what time of day you left the house on Friday, April 21st?

A It was late afternoon. I am not sure what time we left. We were tired and we went back to the Bronx.

Q Where did you stay that evening?

A In the Bronx with friends.

Q Would you tell us what you did on the next day, Saturday?

A Got up quite early and went over to Staten Island, stopped at the precinct on Highland Boulevard to tell them we were going to the house and moving in that day.

That's when the Desk Sergeant, I think he is, or the desk policeman said there had been a fire there last night.

Q What did you do then?

A First we called the Fire Marshal because Chief Johnson --

Q I don't want to get into conversations.

A That's what we did, we called him and went to the house.

Q After the conversation you went to the house?

A Yes.

Q What did you observe at that point in time?

A There was extensive fire damage.

Q What time of day was it that the furniture was scheduled to arrive on that day?

A About 11 o'clock on Saturday. They came about one o'clock with the furniture.

Q What time had you gotten up to arrive at the house?

A We got to Staten Island about eight o'clock.

Q What was your reason in arriving that early?

MR. AGULNICK: Objection.

THE COURT: Well, her reason would be immaterial.

MR. De PETRIS: All right.

Q After the fire which occurred at this house,

there came a time when repairs were made to the house?

A Not for a long time. He would call and say to me, next month, next month.

Q Did there come a time when you ever moved into the house?

A No, we never moved into the house.

Q What residency did you take up at that time?

A I live at the same place 417 Neck Avenue. The City found us the house and we still live there.

MR. DE PETRIS: I have no further questions, your Honor.

(Continued on next page.)

Q When was the first time thatyou saw the individual who lived at that 355 Milton Avenue address?

A April 7th.

Q Or could it have been April xith?

A I'm not sure.

Q Well, the first time you saw him were you with your student friends or were you with your husband?

A That's the time time I became aware. I may have been -- I may have seen him the day before and it didn't register.

Q You were with your friends on that day?

A Yes.

Q Where was he when you first saw him that day?

A It seemed like he was standing on the inside of his storm door.

Q Did you see him with a huge police dog?

A I don't know if it was a police dog, but a large dog.

Q Were you able to see his facial expressions at that time?

A Yes.

Q And how would you characterize him as being?

A In retrospect?

Q How did you feel at that time?

MR. DE PETRIS: No, your Honor.

THE COURT: Any redirect?

MR. DE PETRIS: No, your HOnor.

THE COURT: You may step down. Next witness.

G E R A L D M A D D A L O N E, having been called as a witness, was duly sworn by the Clerk of the Court, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. DE PETRIS:

Q State your name.

A Gerald Maddalone.

Q How old are you?

A Thirty-three.

Q Are you married?

A Yes.

Q Any children?

A Yes. Three boys.

Q By whom are you employed?

A New York City Police Department.

Q In what capacity?

A Police officer.

Q How long have you been so employed?

A Eleven years.

Q What are your duties?

Q What are your duties?

A Assigned to Central Bookking as an arrest processing officer.

(Continued on the next page.)

mm/ss
2am2

BY MR. DE PETRIS:

Q The indictment in this case names four defendants and a co-conspirator Gerald Maddalone.

Are you the Maddalone referred therein?

A Yes.

Q Where did you reside in the spring of 1972?

A 355 Milton Avenue.

Q Will you identify the house on Government's Exhibit 1 in evidence?

A Yes.

Right here (indicating).

Q How long had you resided there?

A Approximately two years.

Q Do you recall when it was when you first moved there?

A 1970.

Q Do you know the defendant Albert Anzalone?

A Yes.

Q Do you see him in the Courtroom?

A Yes.

Q Please point him out.

A The gentleman right there at the end of the table.

MR. DE PETRIS: May the record indicate the

witness has pointed to the defendant Anzalone.

Q How long had you known him?

A For the time period I lived on Milton Avenue.

Q What was your relationship with him?

A Neighborly relationship.

Q How often would you see him?

A In the course of the week, two or three times, possibly.

Q Do you know what his employment was?

A I knew he worked in Manhattan on Wall Street but the capacity I did not know.

Q Do you know the defendant Anthony Vivelo?

A Yes.

Q Do you see him in the Courtroom?

A Yes.

Q Please point him out.

A The second from the left, on the other side of the table.

MR. DE PETRIS: May the record indicate that the witness has identified Anthony Vivelo, the defendant.

Q How long had you known him?

A The same period of time I lived on Milton Avenue.

Q What was your relationship with him?

A Neighborly relationship.

Q Do you know what the relationship was between Anzalone and Vivelo?

MR. AGULNICK: Objection, your Honor.

THE COURT: Sustained. It assumes a fact not in evidence. Sustained as to form.

The question assumes a relationship.

Q Do you know if there was any relationship, whether or not there was any relationship between Mr. Vivelo and Mr. Anzalone?

MR. AGULNICK: Objection.

THE COURT: Overruled.

MR. AGULNICK: May we have a side bar.

THE COURT: Yes.

(Side bar discussion out of hearing of the jury as follows:)

THE COURT: You are aware that the question simply calls for a yes or no answer.

MR. AGULNICK: My objection to this line of questioning is specifically that he cannot testify to their relationship. It goes to their state of mind and he cannot testify whether they were friends or not. It would be hearsay.

THE COURT: Well, you are asking for a conclusion of fact. I think the objection should be sustained in light of this discussion.

MR. DE PETRIS: May I point your Honor to the new Federal Rules of Evidence which permit that sort of question.

MR. AGULNICK: Which rule.

THE COURT: I think here it isn't simply a matter of opinion. If you want to bring out the facts, whether he saw them together, whether he saw them together in the circumstances, you can do it that way.

MR. DE PETRIS: I will do it that way.

MR. AGULNICK: He will not bring them back to a point in 1970 on the street or playing golf?

Relevance -- well, what relevance does that have because two people know each other they must have committed this crime?

THE COURT: No, he can testify as to whether he was ever in the company of both of them and the circumstances and so forth.

MR. DE PETRIS: It would be simpler to give his conclusory answer. If you want me to go through all the details, I will.

THE COURT: Are you standing on the objection.

MR. AGULNICK: Yes.

THE COURT: I will let him go on as we just discussed.

MR. AGULNICK: I will withdraw my objection because of your ruling.

(In the hearing of the jury as follows:)

THE COURT: Please read the pending question to the witness.

(The Court Reporter thereupon read the last question.)

BY MR. DE PETRIS:

Q You may answer the question.

A Yes, it was a close relationship.

MR. AGULNICK: Objection.

THE COURT: Overruled.

MR. AGULNICK: It is characterization.

THE COURT: Overruled.

Go ahead.

Do you know what Mr. Vivelo's employment was?

A New York City Police Department.

Q In what capacity?

A A police officer at the time.

Q Do you know the defendant Nicholas Lombardi?

A Yes.

Q Do you see him in the Courtroom?

A Yes, seated on this side of the table in a gray suit.

MR. DE PETRIS: May the record indicate that the witness pointed out the defendant Lombardi.

Q What was your relationship if any with him?

A Neighborly relationship.

Q Do you know what his employment was?

A He did work for the Department of Correction.

Q Do you know in what capacity?

A I believe as a Correction Officer.

Q Do you know the Defendant Robert Barbieri?

A Yes.

Q Do you see him in the Courtroom?

A Yes.

Q Would you point him out?

A Seated at the end of the table.

MR. DE PETRIS: May the record indicate the witness pointed out the defendant Barbieri.

Q How long do you know him?

A Same time period.

Q What was your relationship with him?

A Neighborly one.

Q Do you know his employment?

A New York City Housing Police.

Q Is there any understanding or agreement between you and the United States Government in connection with this case?

A Yes.

MR. DE PETRIS: May we have this document marked as the next Government exhibit.

THE CLERK: Four-page document entitled Memorandum of Agreement marked Government's Exhibit 11 for identification.

(So marked.)

Q I show you Government's Exhibit No. 11 for identification.

MR. AGULNICK: Objection.

THE COURT: You better come up here for a moment.

(Side bar discussion out of the hearing of the jury as follows:)

THE COURT: I understand you previously have been provided with copies.

MR. AGULNICK: Yes.

MR. FLAMHAFT: If the Government is just going to show Mr. Maddalone the document to see if he remembers it, fine; but if he intends to ask him to

read from it or refresh his recollection, there is no evidence that he himself does not have personal knowledge in detail of the document.

MR. AGULNICK: My objection is different.

He is going to go into questions on what is the agreement. The important thing for the witness to do is to tell what is in his mind. By having the Government thrust this piece of paper in his face, the Government is leading and putting words in his mouth.

If he doesn't know or understand the agreement, he can refresh his recollection.

THE COURT: At the present time it is marked for identification. It is true the ordinary rule is that you ask questions on a verbal basis, but if there is a failure of recollection, if there is a document to refresh his recollection it may go into evidence. I realize it is a formal memorandum of agreement, however, it is not strictly relevant except on the issue of his credibility.

MR. DE PETRIS: I will hold the offer into evidence until redirect examination. There is ample case law for admitting the written document on redirect examination. I was merely asking for

identifying it.

THE COURT: I would simply go ahead and ask him questions and answers.

MR. DE PETRIS: I withhold it until redirect.

(In hearing of the jury.)

BY MR. DE PETRIS:

Q Is there any understanding or agreement between you and the United States Government in connection with this case?

A Yes.

Q What is your part of the agreement?

A That I testify at the Grand Jury and at the trial truthfully.

Q In return, what has the United States Government promised you?

A At the most they would prosecute me for a misdemeanor and recommend that my job take no action against me.

MR. CRECCA: The gentleman is speaking too fast. I did not get that.

THE COURT: Do you want it read back?

MR. CRECCA: Please.

THE COURT: Please read the last answer.

(The Court Reporter thereupon read the last

answer.)

Q As part of this understanding or agreement, is it your understanding -- withdrawn.

What is your understanding with respect to the circumstance should you commit perjury before the Grand Jury or a trial?

A That this agreement would not stand up.

Q In other words, that you would be prosecuted for it?

A Yes.

MR. PETERSON: I object. This is in the nature of being self-serving.

THE COURT: No, I will allow it. It is before the jury now. It is relevant to this line of questioning. You may cross-examine on it.

Q Now, Mr. Maddalone, are you familiar with the house located at 351 Milton Avenue?

A Yes.

Q Where is that house located in connection with your house?

A Across the driveway.

Q Would you identify that particular house on Government's Exhibit 1 in evidence?

A Right here (indicating).

Q I would like to direct your attention to March and April of 1972.

Who resided in the house at that time?

A The house was vacant.

Q Do you know approximately how long it had been vacant?

A About three months.

Q Do you know who resided in the house prior to it being vacant?

A Yes, Roy Gebhardt.

Q How long had you known him?

A Approximately one year and a half.

Q What was your relationship with him?

A It was a friendly relationship.

Q And then in the beginning did something happen?

A Yes. We had a fight over our children and Mr. Gebhardt accused my son of doing something and I punished him. The next day he came to me and apologized and said that his son had lied to him.

MR. PETERSON: I object. It is hearsay.

THE COURT: Technically it is. It seems to me, it is, however it has, it is admissible because of the nature of the relationship. It does not prove the truth of anything.

It proves what this man said another man said to him. To that extent I will allow it.

Q Did there come a time when you learned that someone was going to move into the vacant house at 351 Milton Avenue?

A Yes.

Q Do you recall when?

A I believe the end of March of '72.

Q Who did you learn was going to move in?

A A black family.

Q After you learned that a black family was going to move into the house at 351 Milton Avenue, what if anything was the next thing that happened in connection with the house?

MR. AGULNICK: Objection unless he has personal knowledge.

Q To your personal knowledge, what happened next in connection with the house?

A The front windows on the house were damaged.

Q Do you recall approximately when this took place?

A I believe the beginning of April.

Q Would you tell us what you did on that day? Did you work that day?

A51 Maddalone-direct

A Yes.

Q What hours were your shift?

A 4:00 to 12:00 midnight.

Q After you completed your shift, what did you do?

A I came home.

Q What time did you arrive home?

A 12:30 to 12:45.

MR. FLAMHAFT: Objection. There is no time fixed and how can he testify what time it was.

THE COURT: His answer was the beginning of April. Are we tal ing about April 1st?

MR. DE PETRIS: I do not belie e the witness recalls the exact date.

MR. AGULNICK: May we have the witness testify, and not Mr. DePetris.

MR. DE PETRIS: The witness already testified. If counsel wants, we can have the question read back.

MR. FLAMHAFT: He said the beginning of April. It could have been four or five days.

Q Do you recall the exact date this took place?

A No sir, I do not.

MR. DE PETRIS: May we have the last question and answer read back.

THE COURT: Yes. Please read the last question and answer.

(The Court Reporter thereupon read the last question and answer.)

(Continued next page.)

Q Will you tell us what happened when you arrived home that night?

A I drove down the block to my house. I observed a group of menacross the street from my house.

Q Where were they standing at that point in time?

A In front of Mr. Vivelo's driveway.

Q Can you point it out on Government's Exhibit 1 in evidence?

A Yes. This area (indicating) in the street right here.

Q Point out where the driveway is.

A Mr. Vivelo's house is right here.

MR. CRECCA: Will the record reflect the hand movement of this witness on the Government exhibit in evidence, his manner and demeanor upon getting of the witness chair and getting back on the witness chair, in that it is a staggering manner?

THE COURT: What is that all about?

MR. CRECCA: Subject to connection.

THE COURT: This is not a time to make a summation to the jury. I will not tolerate interruptions of that kind.

MR. DE PETRIS: I move to strike those comments from the record, your Honor.

THE COURT: Those comments are stricken from the record. You are to disregard them.

There will be ample time when all the evidence is in and you heard the whole story for counsel to address you and give you his views as to what the evidence shows and what inferences you may draw from it.

All we are interested in here now is the testimony of witnesses from this stand under oath.

MR. DE PETRIS: Do we have a red marker, your Honor?

THE COURT: I think the Clerk has one.

Q Could you place a red X mark on Government's Exhibit 1 in evidence at the position you observed them in as you arrived home that night?

A Yes.

MR. AGULNICK: If there are going to be other witnesses making identifications using the chart, I ask if the chart be marked it not be used by other witnesses.

THE COURT: I am not going to grant your application. We will work out a color code if need be.

Mr. Maddalone has a red pencil. Go ahead. Do what counsel requests.

THE WITNESS: The best I can do.

MR. DE PETRIS: Maybe this other marker will be better.

THE COURT: Maybe a marker pen.

Q Mr. Maddalone, I also show you Government Exhibit 10 in evidence, an aerial photograph of the area.

Will this marker show up on the photograph?

THE COURT: I doubt it.

Q I ask that the witness point out on the aerial photograph exactly -- maybe we can stand up in front of the jury to show where it is on the aerial photograph --

THE COURT: Here is a real black marker.

Q Would you place an X mark on Government's Exhibit 10A in evidence as to where it was you saw the men standing?

A Yes.

Q It is a little smudged but it shows up somewhat.

THE COURT: Show it to counsel.

(Pause.)

MR. DE PETRIS: May I just hold it up in front of the jury, your Honor?

THE COURT: Yes.

(Document shown to jury.)

Q On this aerial photograph, 10A in evidence, Mr. Maddalone, could you identify the house -- your house,

the Charles house, and Mr. Vivelo's house?

A Yes, sir.

THE COURT: Do you want to mark that in some way?

MR. DE PETRIS: If it is possible, or maybe I can just point it out to the jury --

THE WITNESS: This is my house, teis is the Charles house, and this is Mr. Vivelo's house (Indicating).

MR. DE PETRIS: Unless there is any objection by counsel --

MR. AGULNICK: On behalf of my client, I will stipulate to the location of the houses. I will concede that the houses are at the location.

MR. DE PETRIS: We don't need a speech.

MR. AGULNICK: To expedite the trial --

THE COURT: Since there are many houses, maybe we should indicate by an initial, Maddalone put an M and so on.

Q Mr. Maddalone, on top of your house, would you place an M on the roof of your house, on the roof of the Charles house would you place a C, and on the roof of Mr. Vivelo's house, would you place a V?

A Yes, sir.

MR. DE PETRIS: Now, may I just walk in front

of the jury with that, your Honor?

THE COURT: Yes.

MR. DE PETRIS: V, C and M (indicating).

MR. AGULNICK: May we have it passed around to each juror?

THE COURT: All right. Why don't you look at it and Mr. De Petris can go ahead.

MR. DE PETRIS: Your Honor, I prefer to have them see it first.

THE COURT: All right.

(Pause, while jury examines exhibit.)

Q Mr. Maddalone, would you tell us what happened when you arrived home this night?

A I pulled into my driveway, got out of my car, and one of the people in the group across the street motioned me over to the group.

Q Did you go over to the group?

A Yes, sir, I did.

Q Tell the Court and jury who it was in this group that night?

A Mr. Anzalone, Mr. Vivelo, Mr. Lombardi, Mr. Barbieri, and I believe Mr. Moriele.

Q Mr. Moriele, the house has not been pointed out, would you identify that on the chart?

A Yes, sir. 367.

Q 367?

A Yes.

Q Would you tell us what happened next on that night?

A One of the men in the group pointed to the Charles house. When I turned toward the Charles house I observed the front windows were broken.

Q When you say broken, what do you mean?

A Some were cracked and some had small holes in it.

Q Then what happened?

A We stood on the street for awhile, talked, and then we proceeded into Mr. Vivelo's house.

Q When you were standing there on the street, did any of them have anything with them?

MR. AGULNICK: Objection to the leading. I ask that the United States Attorney not lead.

MR. DE PETRIS: It is not a leading question.

THE COURT: It's not leading in the sense you mean.

MR. AGULNICK: I vigorously disagree with your Honor.

THE COURT: Objection overruled.

MR. DE PETRIS: Can you read the last question

to the witness?

(Whereupon, the last question was read by the Reporter.)

A Yes, sir.

Q What was that?

A They had BB guns.

Q Who had BB guns?

A Mr. Vivelo, Mr. Anzalone, and Mr. Lombardi.

Q Mr. Barbieri did not have a BB gun?

A No, sir.

Q Had you ever seen a BB gun before?

A Yes, sir.

Q Where was that?

A I own one.

Q Did you have it with you that night?

A No, sir, I did not.

Q Is there anything else that happened while standing out on the street?

A I had my back to the Charles house and I heard a sound like apop from behind me, like air being released, and somebody from the group said -- the best I can recall -- "What are you, crazy, Nick? What are you doing?"

I turned and I saw that Mr. Lombardi was facing the Charles house with the BB gun in his hand.

Q How many releases of air did you hear at that point in time?

A The best I can recall, just one.

Q Then what did you do on that night?

A We then proceeded into Mr. Vivelo's house.

Q Where did you go in Mr. Vivelo's house?

A In his kitchen.

Q Who was it that was in the kitchen at this point in time?

A Mr. Vivelo, Mr. Anzalone, Mr. Lombardi, Mr. Barbieri, myself, and I believe Mr. Moriele.

Q Did a conversation take place at that time?

A Yes, sir.

Q Would you tell us what was said at that time?

A We discussed what could be done to stop the Charles family from moving into the house.

You want me to continue?

Q Yes. Tell us the entire conversation as you recall it.

A I am sure there were obscenities by me and others because of the Gebhardts and Charleses.

Mr. Vivelo made a suggestion --

MR. AGULNICK: I object. There is no reference as to who said anything, just obscenities were being

THE COURT: He is being asked to relate the conversation. If he can identify a speaker, I think he is entitled to say who it was.

MR. AGULNICK: My objection is he did not identify a speaker. He just is speaking in generalities here.

MR. DE PETRIS: He did say he was one of the ones that --

THE COURT: Do you want the details of the obscenities, is that what you want?

MR. AGULNICK: Judge, can I have a side bar?

THE COURT: I don't think it is necessary.

MR. AGULNICK: I thought I made myself clear on this, your Honor.

THE COURT: Your objection is overruled.

MR. DE PETRIS: I will try to clarify it.

Q Mr. Maddalone, you said you had passed some obscenities?

A Yes.

Q Do you recall anyone else?

A I don't recall who said what about Charles and the Gebhardts.

Q Do you recall whether any people did say them?

A Yes.

MR. AGULNICK: I object. He doesn't remember who said what.

THE COURT: A moment ago you were objecting to my asking whether you wanted it brought out.

MR. GOGEL: Could we have a side bar?

THE COURT: I don't think it is necessary.

Go ahead.

Q Mr. Maddalone, would you tell us what else was said in this conversation?

A Mr. Vivelo said that he could get a couple of men to fake a traffic accident with Roy Gebhardt and start a fight with him and beat him up.

Q Who is Roy Gebhardt?

A The former owner of 351 Milton Avenue.

Q What else was said in the conversation?

A That Mr. Vivelo would get somebody to shoot holes in the roof of the house. And the best I can recall, either Mr. Vivelo or Mr. Anzalone stated the only way to stop the family from moving in was to burn down the house -- was to burn down the house.

Q Do you recall anything else that was said in the conversation?

A Yes. At one point I stated I felt we were entering into a conspiracy at the time --

MR. PETERSON: Objection and move to strike.

THE COURT: Overruled.

Q Do you recall what else, if anything, was said in that conversation?

A No, sir, I don't recall anything.

Q Approximately how long did this conversation last?

A No more than half an hour.

Q Did you reach an understanding on that night?

A Yes.

Q What was that?

A Something had to be done to stop the Charleses from moving into the house.

Q Was there any agreement which of the various suggestions should be followed?

A No, sir.

Q What happened after the conversation was completed?

A We broke up and I went to my home.

Q What did you do when you arrived home?

A I went into my house. I contemplated what I could do to be part of the group.

MR. AGULNICK: Objection to what he contemplated.

Q Did you do anything?

MR. AGULNICK: I ask the answer be stricken out.

THE COURT: All right, I will grant your application to strike the contemplated answer and the jury is to disregard that.

What did he do?

Q Would you tell us what you did after you arrived home?

A Went into my house. Went down the basement. Got a small jar of paint. Came outside, looked around to see if anybody was around the street. I didn't see anybody. And I threw the paint on the front door of the house.

Q Where were you standing when you did this act?

A In the driveway.

(continued next page)

Q Can you describe the relationship between your house and the house at which you threw the paint?

A Right across the driveway from me.

Q Where is the entrance to the house?

A Recessed back from the front face of the house approximately eight, ten feet.

Q What did you do after you completed this?

A I went into my house and went to sleep.

MR. DE PETRIS: Your Honor, perhaps we should have a side bar on the photograph.

(The following took place at side bar.)

MR. DE PETRIS: Your Honor, this is a photograph that was taken of the house after the fire. What I propose to do is have Mr. Maddalone identify the windows and the doorway where the paint was thrown and the broken windows.

This isn't how it looked on the night, this was after the fire -- this is the condition after the fire and I would make that clear for the record.

I would ask Mr. Maddalone to point to the windows in the house that were broken and where you could see the recessed door.

MR. CRECCA: The basis for my objection is that on this photograph there is the American flag planted

on the front lawn and I think this is highly inflammatory and prejudicial, not only to my client, but I suggest to each and every defendant in this case.

That is one basis for my objection and certainly for the moment this does not depict the actual damage as this gentleman will testify as allegedly caused by the BB shots.

MR. GOGEL: Is this a fair and accurate representation of the condition on April 6th and 7th as alleged?

MR. DE PETRIS: It's a fair and accurate representation --

MR. CRECCA: Can you lower your voice?

MR. DE PETRIS: Yes. It's a fair and accurate representation of the condition on April 22nd which also will be relevant later.

I want to point out now what the witness just identified.

THE COURT: You say the way the windows now appear would not be after the BB shots?

MR. DE PETRIS: Not until after the fire.

THE COURT: I'm not exactly sure what it is you want him to do. To point out windows that were broken and things like that?

MR. DE PETRIS: Yes.

THE COURT: I don't think he can fairly do that from this photograph.

Is there another one?

MR. DE PETRIS: None was taken on April 7th. Your Honor, they are going to see the photograph later.

THE COURT: I know.

MR. DE PETRIS: They might as well see it now.

MR. CRECCA: I would object again to it --

THE COURT: Did this witness see the condition of the house?

MR. DE PETRIS: After the fire?

THE COURT: Show it to him and you can ask that. I thought you said something about a fire marshal.

MR. DE PETRIS: The fire marshal will also testify.

THE COURT: Can this witness testify he saw the house in this condition?

MR. DE PETRIS: Sure, everybody in the neighborhood did.

MR. GOGEL: This is not the proper time.

THE COURT: Let's stop the horsing around. If he can testify this was the condition of the house after the fire he can certainly identify this photograph and

it can be offered in evidence. He can then use it to point out--

MR. CRECCA: Who is this (indicating)?

MR. DE PETRIS: That's a workman.

MR. GOGEL: There is a proper time and place to put it in.

THE COURT: If a picture is needed in order to illustrate what this witness has said about what he saw and where he threw the paint, there is no use holding it up any longer. This is going in sooner or later. The witness can identify how the house looked after the fire but did not look that way the night they were talking. But he can point out certain windows were broken and later on he came out and threw the paint.

MR. DE PETRIS: I will stipulate this was not the condition that night but after the fire.

MR. GOGEL: My objection --

THE COURT: I will overrule the objections.

MR. CRECCA: Note my objection, please, Judge.

MR. DE PETRIS: Shall I tell that to the jury?

THE COURT: You better ask the witness. You better get into whether he observed the house the day after the fire.

MR. DE PETRIS: I better wait and until we get

the fire otherwise it will be disoriented.

THE COURT: You better wait on this then.

(The following took place in open court.)

DIRECT EXAMINATION

BY MR. DE PETRIS: (continuing)

Q Mr. Maddalone, did you yourself ever see the black family at the house at 351 Milton Avenue?

A Two occasions.

Q Do you recall approximately when those occasions were?

A Approximately the second week of April.

Q Of what year?

A 1972.

Q Do you recall the exact date?

A No, sir, I don't.

Q Will you tell us what happened on each of those occasions, take the first occasion and tell us what happened on that date?

A The first occasion I just remember them pulling into the driveway. I looked at them through my front door and closed the door.

Q How did you close the door?

A I slammed it shut.

Q Do you remember anything else on that day?

A No, sir.

Q You say there was a second occasion when you saw them?

A Yes.

Q Do you recall approximately when it was in relation to the first occasion?

A Approximately a few days after the first time I seen them.

Q Tell us what happened on that occasion?

A I was outside leaning against my car with my dog. Mr. Morreale was talking to me and the Charles' had come with some people and carrying stuff into the house.

Q What if anything did you do?

A I stood there with my dog. My intent was to harrass them with the dog.

Q What kind of a dog do you have?

A A German shepherd.

Q Anyone else on the block have a German shepherd?

A At the time, Mr. Vivelo.

Q Now, I would like to direct your attention, Mr. Maddalone, to the next Sunday afternoon in April of that year.

MR. AGULNICK: I object now to leading.

MR. DE PETRIS: I am simply directing the witness' attention --

MR. AGULNICK: To a date.

MR. DE PETRIS: I am going to ask what happened on that date.

MR. AGULNICK: We are at a crucial part of the testimony, I ask that he not lead, your Honor.

THE COURT: Try not to lead the witness.

MR. DE PETRIS: I don't know how else --

THE COURT: Did there come a time when something occurred? What did he observe?

MR. DE PETRIS: That would be even more leading.

THE COURT: No, they can't object to that.

Q Mr. Maddalone, after the incident with respect to the windows, did there come a time when anything else occurred?

A Yes sir.

Q What was the next thing that you recall?

MR. AGULNICK: If anything.

Q If anything?

A A group of men approached me and told me they were going down to the real estate to --

Q Well --

MR. AGULNICK: May he complete his answer?

MR. DE PETRIS: Fine. I have no objection.

THE COURT: Go ahead.

A In an attempt to find out what was going on with the house.

Q When did this take place?

A One Sunday, mid-afternoon, when I was working on my car.

Q Do you recall who it was that approached you on that occasion?

A Mr. Tortora, Mr. Miller, a man by the name of Pete, and I believe a man that lived across the street from me, Louie, and another man I wasn't familiar with.

Q You mentioned a Mr. Tortora, would you identify his residence on the chart?

A Yes, sir. Right up here (indicating). 336 Milton Avenue.

Q You mentioned Mr. Miller, would you identify his residence on the chart?

A Yes, sir. 337 Milton Avenue.

Q You may sit.

Mr. Maddalone, did you go with them to the real estate office on that date?

A No, sir, I didn't.

Q Did there come a time when they returned?

A Yes.

Q Then what did you do?

A I --

MR. AGULNICK: I'm sorry, did there come a time when they returned, can't he just ask what happened, what occurred, rather than leading the witness?

MR. DE PETRIS: Your Honor, did there come a time when they returned is hardly a leading question.

THE COURT: I agree. I overrule the objection.

MR. DE PETRIS: May we have the last question and answer to continue the continuity?

(Whereupon the last question and answer were read by the reporter.)

A I went over to some people in the street to find out what had happened with regard to the house.

Q Did you have a conversation with them?

A Yes, I did.

MR. DE PETRIS: May I have a moment?

(Pause.)

Q Mr. Maddalone, did a conversation take place?

A Yes.

Q What was said?

THE COURT: Who were the participants, if you remember?

MR. DE PETRIS: I think they have already been identified.

THE COURT: I am not sure.

Q Who were the participants?

THE COURT: This is after a return from the real estate office. We don't know who came back or whether others came back.

Q Who was present in the group at that time, if you recall?

A At that point I don't exactly recall who I spoke to from the group.

MR. DE PETRIS: I withdraw the question as to the conversation, your Honor.

THE COURT: All right.

Q Do you recall whether or not any of the three individuals who were mentioned before were present at that time, if you recall?

A I know I spoke to Mr. Tortora, but I don't know his exact words to me.

Q You say there came a time when you had a conversation with Mr. Tortora?

A Yes, sir.

Q Do you recall when that was?

A I believe that was the same day the men had gone down to the real estate office.

Q Do you recall where that conversation took place?

A On the street. On Milton Avenue.

Q What did you say to him and what did he say to you?

A He told me that the house was to be rented by the Charles' with option to buy. And also I believe that he wanted to buy the house. That's all I remember.

Q Do you recall anything else at that time?

A No, sir.

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(Continued on next page)

Q Did you ever have a conversation with him concerning meeting with the Charles family?

A Yes, sir.

Q Was that the same conversation or another conversation?

A Another conversation.

Q When did this conversation take place?

A One morning when I was going to work.

Q Where did it take place?

A On the street.

Q Who was present on that occasion?

A Just Mr. Tortora and myself.

Q What did he say to you and what did you say to him?

A He told me that a real estate office called him and wanted some people to go down and meet with the Charleses.

I told him I thought it would be a good idea.

Q Was anything else said at that time?

A No, sir, not that I can recall.

Q Did you have a conversation with anyone else about that subject?

A Yes.

Q Who was that?

A Mr. Vivelo.

Q When did that take place?

A I believe it came in the afternoon.

Q Where?

A Again on the street, on Milton Avenue.

Q Was anybody else present?

A Not that I can recall.

Q Tell us what he said to you and what you said to him.

A I told him what Mr. Tortora said to me about meeting with the Charleses.

He said not to go down there, it might be a setup.

Q Do you recall anything else that was said at that time?

A No, sir.

Q To your knowledge was any meeting ever held with the Charles family?

A Not to my knowledge.

Q After this Sunday afternoon which you have testified about, what is the next thing that happened in connection with the house to your personal knowledge?

A A group of people, including myself, decided--attempted to take up a collection to give somebody a down pay-

ment to buy the house.

Q When did this take place, to the best of your recollection?

A I believe that Sunday.

Q Do you recall approximately what time of the day?

A Into the evening hours.

MR. AGULNICK: May I have a clarification. He said "that Sunday."

Q What do you mean by "that Sunday"?

A The same Sunday that the group of men had gone down to the real estate office.

Q Would you tell us what occurred on that evening.

A A group of men from the block, myself included, and again I believe some men from Tyson Lane went up and down the block--

Q When you say "block" what do you mean?

A Hilton Avenue.

Q Can you tell us who was present on that occasion?

A Mr. Tortora, Mr. Miller, Mr. Lombardi, a man named Pete, myself, and again these men from somewhere in the area in the neighborhood that I wasn't familiar with them.

Q Did you have a conversation at that time with these men?

A I would say some of them.

Q To the best of your recollection would you give us the substance of what was said.

A That we were going to canvass the block and attempt to find out who would contribute moneys to give someone else a down payment to buy the house.

MR. AGULNICK: I object to this conversation with regard to my client and ask it not be considered as to my client.

THE COURT: I will overrule the objection, but I will instruct the jury that at some point before evidence may be considered by you against a defendant, you will have to reach a conclusion based on evidence as to whether that defendant was in fact a participant; do you understand? Just bear that in mind. I am giving you a guideline in considering evidence as this case goes along, as you listen to it.

Go ahead.

Q Now, Mr. Maddalone, which house were you talking about?

A The Charles house, 351 Milton Avenue.

Q In this conversation was it discussed who would get the house?

A One of the white families that had looked at it prior to the Charleses.

Q After this conversation, tell us what if anything you and the other people in that group did.

A I went to Mr. Cacciapuoti's house.

Q What block did he live?

A Manila Avenue.

Q That's around the corner; is that correct?

A Yes, that's behind it.

Q Tell us what you did on that occasion.

A I went to Mr. Cacciapuoti and explained to him that a group of us were going around the neighborhood in an attempt to raise funds for a down payment for somebody else to buy the house.

I explained to him that I wasn't forcing him to do this. If he wanted to contribute, fine, if not, that was all right, too.

Q What did he say?

A He wasn't interested in contributing any moneys. Then I rejoined the group of men.

Q What did you see this group of men doing?

A They were in the neighborhood going to different

houses.

Q What else took place on that evening?

A Mr. Lombardi had a pad with names on it for people who were willing to contribute moneys towards a down payment on the house.

Q Was your name on that pad?

A Yes, it was.

Q How did it get on there?

A The best I can recall Mr. Lombardi put it down.

Q How do you know he did?

A I told him to.

Q Can you describe this pad.

A Similar to a steno pad.

Q Were there other names on the pad as well as yours?

A Yes.

Q Was any money actually collected that night?

A Not that I know of.

Q Was any money ever collected?

A Not that I know of.

Q Do you know what happened to that list?

A It was destroyed.

Q When?

A After the fire.

Q How do you know this?

A I had told Mr. Lombardi to destroy the list of names.

Q You had a conversation with Mr. Lombardi?

A Yes, sometime after the fire, on the street.

Q Do you recall who was present?

A Just Mr. Lombardi and myself. I told him to destroy the list of names he has and he said he had already done it.

Q Did you make any other efforts to find a white family to buy the house?

A Yes. One of the neighbors on the block had a friend who was a fireman and through her I found out his name and where he lived and I went to his residence with Mr. Lombardi and left a note asking him to call me if he was still interested in buying the house.

Q What was on the note?

A I put my name and phone number. I don't know why I left the note.

Q Did he call you?

A Either he or his wife did and they told me they weren't interested in the house any more.

Q After this evening, tell us what was the next

thing that happened in connection with the house.

A Water damage was done to the house.

Q When did this take place, do you recall?

A The date?

Q Yes, sir.

A No, sir. It was in April sometime of 1972.

Q What time of the day did this occur?

A Late into the evening.

Q Tell us what happened on this occasion.

A Mr. Barbiero came to my door and rang my bell. I let him in and we had a conversation.

Q Who was present?

A Mr. Barbiero and myself.

Q Tell us what he said to you and what you said to him at this time.

A It was very brief. He just said some men were going to do some damage to the house that night and at this point I got worried and told him to please get out of my house and tell these men to get away from the house or theywould get me in trouble for doing this damage next door to me.

Mr. Barbiero got up and I got up with him and he went to exit my house. He opened the front door and began to step outside. He stepped back in my house and pushed

the door closed and at this point he told me "It's too late -- it's done already."

Q When the door was opened were you able to see anything?

A Yes, sir.

Q What did you see?

A Two figures running on Milton Avenue towards Tysen Lane.

Q Are you able to identify who they were?

A No, sir.

Q Was anything else said during this conversation at that time?

A I don't recall anything else.

Q What happened after the conversation was completed?

A Mr. Barbiero left.

Q What did you do, if anything?

A Waited a little while and went outside my house.

Q What did you observe or hear at that time, if anything?

A I could hear water running in 351 Milton Avenue.

Q Did you see anyone else that night?

A No, sir.

Q Did you report what you heard to the police?

A No, sir.

Q You were a policeman at that time; is that correct?

A Yes, sir.

Q After you heard the sound of running water, what did you do?

Q I went in my house. I don't know if I went to sleep or stayed up a while.

Q Do you have any other personal knowledge with respect to that water damage?

A Something I believe that was told to me.

Q You had a conversation with someone?

A Yes. This was the morning after the water damage was done.

Q Who was present?

A Mr. Anzalone and Mr. Lombardi.

Q Where did this conversation take place?

A In the front of my house near the steps.

Q Tell us what was said at that time.

A Mr. Lombardi had seen the front door of 351 Milton Avenue partially opened and he wanted to go close the door, and I told him to stay off the property, that anybody on the property seeing what happened to the house would get

in trouble. He and Mr. Anzalone at this point -- I believe it was Mr. Anzalone that told me they had done the damage the night before to the house.

Q Was anything else said at that time that you can recall?

A No, sir.

Q After this event took place, what if anything was the next damage that was done to the house to your knowledge?

A The fire.

Q Do you recall when that took place?

A It was in late April.

Q Do you recall the exact date?

A No, sir.

Q Do you recall what your actions were on the day of the night of the fire?

I had finished a 12 midnight tour to 8:00 a.m. in the morning and I had taken that night off and I was up most of the day and I fell asleep on my living room floor.

Q You-- What did you do during the day? Were you working?

A No. I stayed up, though.

Q Tell us what happened on that evening.

A That evening the first thing I remember my wife

screaming my name.

Q Where were you?

A On the living room floor sleeping.

Q What had you been doing?

A I started watching television prior to that and I fell asleep. My wife screamed my name. I sat up and I could see flashing red lights through my curtains.

I went to the front window and saw a fire engine in front of my house and a lot of people on the street.

First I thought it was a joke.

I ran to my front door, opened the front door and got hit in the face with a lot of smoke.

I looked on the side of my house and I could see flames shooting out of 391 Milton Avenue.

At this point I don't remember what I did, if I closed my front door or just went back in the house. I yelled to my wife, "Get the children and let's get out of here."

My sister-in-law came over and helped us get the children out.

At that time Mr. Vivelo came to my front door and somehow got my attention and I opened the door and he said, "Don't worry. We thought you were out of the house." He invited us over to his house. We brought the children over there.

AS:CR
3AM-3

THE COURT: Step down and Agent Savadel will take the stand.

V I N C E N T J. S A V A D E L, having been called as a witness, was duly sworn by the Clerk of the Court, took the stand and testified as follows:

XXXXXX

THE COURT: Do you wish to conduct the direct examination first?

MR. DE PETRIS: Yes, your Honor.

THE CLERK: State your full name.

THE WITNESS: Vincent J. Savadel.

DIRECT EXAMINATION

BY MR. DE PETRIS:

MR. DE PETRIS: Shall I proceed?

THE COURT: Yes.

MR. DE PETRIS: Does your Honor want this done in front of the Jury?

THE COURT: Of course.

Q Mr. SAvadel, your the case agent on this case?

A Yes, I am employed by the Federal Bureau of Investigation and I am the case agent in this investigation. I'm a resident agent of the FBI offic in Staten Island, New York. I am responsible for the complete investigation of the case.

Q Did you conduct a number of interviews?

gr/ss

4aml

Savadel-direct

BY MR. DE PETRIS:

Q That was after the conversation in the U. S. Attorney's office?

A Yes sir.

Q What, if any, notes did you take on that occasion?

A On the date of the interview, March the 5th, 1974, I took numerous notes during the course of my interview with Mr. Maddalone.

Q Would you tell the Court and the jury--- withdraw that. Not the Court.

Would you tell the jury what the practice is of the FBI concerning the notes?

A The practice of the FBI concerning investigative notes is as follows: When the notes are reviewed and dictated and the finished copy comes back, and that is proof-read by the agent who made the dictation, the notes, the actual investigative notes of the Agent may be destroyed, on authority of the Assistant Attorney General in charge of the Criminal Division of the Department of Justice.

There is no reason to retain those notes.

MR. AGULNICK: Objection to that, your Honor. The last comment. Move to strike the last comment.

THE COURT: Denied. Overruled.

A With regard to the present case?

Q Yes.

A I did.

Q Was one of those interviewed Mr. Gerald Maddalone?

A It was.

Q Do you recall the first time you interviewed him was?

A The first time I participated in an interview with him with other individuals was in the office of the United States Attorney, the date, approximately, March fourth or fifth of '72.

Q Prior to that time had you spoken to Mr. Maddalone in his home?

A Yes, on approximately February 19th or 11th of 1972 -- I'm sorry, of 1974.

Q When was the next time you saw him?

A Well, several days later after I initially spoke to Mr. Maddalone I contacted him again.

May I explain why I had to recontact him?

Q First, on the first time, I show you Government's Exhibit 3500-4A, and I ask you if you recognize that exhibit?

(Exhibit shown to witness.)

A Yes, sir, this is a write-up of the first interview I had with Mr. Gerald Maddalone.

Q What date was that?

A The date appears to be February 19, 1974.

MR. CRECCA: We concede that we have that. We also concede that we have the interview of March fifth of 1974.

We concede that.

MR. DE PETRIS: May I proceed, your Honor?

THE COURT: Yes.

Q And page two of that exhibit, what is that?

A Page two of that exhibit is two days later I approached Mr. Maddalone a second time and this is a write-up of that particular contact with him.

MR. CRECCA: We concede that we have that.

Q On either of those occasions was there any lengthy interview of Mr. Maddalone?

A No, they were very brief. He didn't want to be interviewed.

Q He wanted to consult an attorney first?

A Yes.

MR. AGULNICK: May we the U.S. Attorney not lead the witness?

THE COURT: Yes, please.

Q When was the next time you saw Mr. Maddalone?

A The next time I saw Mr. Maddalone was in early

March of 1974 I believe that was in the U.S. Attorney's office.

Q May I show you Government's Exhibit 3500-4B? I ask you if you recognize that?

(Shown to the witness.)

A Yes, sir. This is the complete interview which I conducted with Gerald Maddalone which took place in his home on March the fifth, 1974.

MR. CRECCA: There has been a concession. We're not disputing that.

THE COURT: All right. Now we'll find out --

MR. DE PETRIS: May I proceed?

THE COURT: The questions are about notes.

MR. DE PETRIS: If we're going to do it, let's do it.

Q What was the date of that?

A This is dated March fifth, 1974.

Q That's the date of the interview; is that correct?

A Yes.

(Continued on the next page.)

All right.

(Whereupon, the jury left the Courtroom at 12:55 o'clock p.m.)

THE COURT: You are excused now. You will have to be back here at 10:00 o'clock Monday morning.

THE WITNESS: Yes, sir.

(Whereupon, the witness was excused at this point.)9

THE COURT: I see so many expectant looks I am wondering what is coming next.

MR. CRECCA: Judge, if I may. At this point, onbbehalf of my client, Robert Barbiero, in view of the testimony of Agent Savadel, wherein under examination by the gentleman that just completed his examination, and my colleague and associate, Mr. Peterson, it was stated that notes and our memorandum, however the case may be, should attune as I understand it, sir, of no less than 25 in number of interviews with this particular witness, Madallone, who apparently is a prime Government witness. Said notes being destroyed, and unavailable for the defense. I now move, because once again of misconduct on behalf of the Government, to dismiss this indictment on behalf of Barbiero. My colleagues will all join me, I assume.

MR. AGULNICK: Yes, your Honor. I join on behalf of my client.

MR. GOGEL: I join also.

MR. FLAMHAFT: Or in the alternative.

MR. AGULNICK: I say that if your Honor denies this motion, then I will ask for the production of the memoranda that Agent Savadel has --

MR. DE PETRIS: Your Honor has been both a Judge and a United States Attorney and an FBI agent. I think you can take judicial notice of the FBI in that regard.

MR. GOGEL: I don't think that is a matter of judicial notice.

MR. CRECCA: Regardless of the FBI, and their rules and regulations, I think case law is appropriate on this particular aspect. There was something that someone else said if the application was denied --

MR. FLAMHAFT: Calling for the Attorney General's authorization for the FBI agent to destroy the material.

THE COURT: I see.

MR. GOGEL: I move in both cases to join.

MR. DE PETRIS: There was no such case law that would support this application. I would ask Mr. Crecca to produce the cases he is talking about. I will call

his bluff.

MR. CRECCA: You are not calling any bluff of mine, sir. If there is a case in point, it will be produced, sir. I don't bluff.

THE COURT: All right. Well, so this is now on behalf of all the defendants.

MR. FLAMHAFT: Yes.

THE COURT: Well, in the light of Agent Savadel's testimony, I will deny the application with respect to the application to request the specific authority. I don't know what the Government's position is on that. Will the Government undertake to find out as a practical matter, whether there is such specific authority, and if there was, the Government should produce it.

MR. DE PETRIS: Yes. Not with respect to this case. It will be in general.

THE COURT: No. What I mean, specific authority on this practice.

MR. DE PETRIS. Yes, your Honor. I will do that.

THE COURT: Well, that is the best I can do.

MR. CRECCA: Thank you, sir.

MR. GOGEL: If that authority requires permission in a request to do so, I ask that that be produced too.

THE COURT: You mean in each specific case? I

Q Did you ever see Anzalone shoot a Beebee gun that particular night?

A I did not see him shoot the gun that night.

Q Do you remember what Morreale's conversation was that particular night?

A No, sir, I couldn't say that I do.

Q How long would you say that the incident lasted from the time you came upon these men with the Beebee guns until the time that the meeting was over at Vivelo's house?

A I'd say about a half hour.

Q All together?

A Yes, sir.

Q About how long a part of that half hour was the Beebee gun incident?

A Outside in the street?

Q Yes.

A I'd say no more than five minutes.

Q Did you see Mr. Morreale in the house at the meeting?

A I believe he was there, yes. Something made me feel that he was there.

Q Something makes you feel he was there?

A Yes, sir.

Q What is that something? Is it your conscience, sir?

A No, sir.

Q Do you remember any conversation by Mr. Morreale?

A No, sir, I don't.

Q Would it be corredttto say that there is a great deal about these incidents on that particular night that you don't remember?

A Yes, sir.

Q Did you consider that night an extraordinary event?

A Yes, sir.

Q As a matter of fact, there is a great deal you don't remember in regard to who said what during the conversations; is that correct?

A Not a great deal, sir.

Q But somewhat?

A One thing, sir.

Q But you don't remember anything that Mr. Morreale said?

A No, sir.

Q Do you remember if Mr. Morreale had a Beebee gun?

A I would say he didn't.

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Q Do you know or you are not sure?

A I know three people who had Beebee guns, definitely.

Q And possibly others might have had them?

A No, sir.

Q You're positive of that?

A Yes, sir.

Q But you are not positive as to whether Morreale was there or not?

A That's correct.

Q Now, there came a time, I think you testified, that you all went into Mr. Vivelo's house; is that correct?

A Yes, sir.

Q And how long would you say the conversation lasted in his house?

A The remainder of the half hour, sir.

Q Was it at that time you made up your mind you were going to get rid of your Beebee gun?

A I can't say that it was.

Q While you were in the house, there was a discussion in the house; is that correct?

A Yes, sir.

Q Would you say that there were suggestions just thrown around the room?

A Yes.

Q Only suggestions?

A Yes, sir.

Q Would you say there was never any agreement in regard to any of these specific suggestions by the members of the group?

A Yes, sir.

Q Would you say there were never any votes taken on anything that was discuss in that room?

A No, sir, there were no votes taken.

Q It was somewhat of a general discussion, wasn't it?

A Again in what respect? I don't understand you.

Q It wasn't a structured meeting. There were just words that were being thrown around and some people were angry?

A Yes, sir, I would say some people were angry including myself.

Q You were very angry at that time?

A Yes, sir.

Q Was there any discussion about the use of paint?

A No, sir.

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Q You didn't bring up the fact that you were going to go out later and splash some paint on the door?

A I hadn't thought about it at the time.

Q You hadn't even brought that up?

A No, sir.

Q As a matter of fact, to your knowledge, no one knew that you splashed this paint?

A That's correct.

Q And this was something that you did on your own?

A That's correct.

Q Did ithere come a time during this meeting that you had when you got disturbed about the tone of the conversation?

A About the tone of the conversation on suggestions being made.

Q Yes.

A I'd say yes.

Q And you mentioned something on direct examination about a conspiracy?

A Yes, sir.

Q What were your exact words at that time?

A The best I could recall, I felt we were entering into a conspiracy.

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Q You felt you were entering into a conspiracy?

A Yes, sir.

Q Did you say anything else?

A No, sir.

Q Did you leave the meeting at that point?

A I would say we all broke up at one time and left.

Q You were very upset about their entering into a conspiracy; is that correct?

A That's correct.

JB fls.

(Continued on next page.)

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Q Extremely upset about it?

A I would say so.

Q What did you do?

A I did nothing, sir.

Q Well, didn't you take some paint and splash it on a door?

A Yes, I did.

Q And why did you take the paint and splashit on the door, sir?

A Because I wanted to be part of this group, sir.

Q You wanted to be part of this conspiracy?

MR. DEPETRIS: Your Honor, may we ask that Mr. Agulnick -- Well,I think it's obvious what my request is.

MR. AGULNICK: I don't read minds, sir. If you are going to say something, please put it on the record. Let therecord reflect what you have to say, sir.

THE COURT: Well, let me remind Counsel, it isn't good practice to descend upon the witness.

MR. AGULNICK: I apologize to the Court, your Honor. I ask that specific objections be placed on the record.

Q Well, I ask you again, Mr. Maddalone --

A Yes.

Q Did you splash this paint upon the door so that

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you could be part of this conspiracy?

A Part of this group, sir.

Q But you didn't consider the group to be a conspiracy?

A I considered the talking of what was to be done to stop the Charles from moving in a conspiracy. I did.

Q I see. But you didn't consider thepaint splashing to be part of a conspiracy; is that correct, sir?

A Did I consider it to be part of a conspiracy?

Q Yes.

A No. It was something that I did.

Q You did alone?

A Yes.

Q And it was something that you did so that you personally could feel like you were part of thegroup?

A That's correct.

Q And it was for your own benefit at that time; is that correct?

A Yes, sir.

Q Was your consicience bothering you at that time, si

A No, sir.

Q Now, sir, you mentioned before that there was a discussion or a suggestion about burning the house; is that correct?

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A Yes, sir.

Q Can you say now, positively, under oath, that Mr. Anzalone made that suggestion that night?

A I said that either Mr. --

Q I am asking you, can you say now, positively --

MR. DEPETRIS: May the witness be allowed to finish answering thequestion? He was in the middle of answering the question.

MR. AGULNICK: I asked that he answer the question that I pose.

THE COURT: Do you want the question reread?

MR. AGULNICK: It's a yes or no answer.

A No, sir, I cannot.

Q As a matter of fact, sir, far back as March of 1974, when your recollection was even better than it is today, you couldn't say that?

A That's correct, sir.

Q Sir, did you ever havea discussion later on, after these incidents, with other persons in the community about covering up the various activities?

A Yes, sir, I did.

Q And did you have that discussion with Mr. Tortora and Mr. Moriao?

A Mr. Morreale, I can be definite on. Mr. Tor-

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tora, I can't be sure.

Q Well, what is your best recollectionat this time?

A I would say I did.

Q And also a lady that lived on the block?

A Yes, sir.

Q And was there some sort of agreement amongst you and those individuals about not divulging each one's activities?

A Yes.

Q When was that discussion had?

A I would say the time the investigation started.

Q Was it in the beginning of the investigation or later on?

A I would say the beginning.

Q Was that before or after you threw away your beebee gun?

A I would say after.

Q Sir, in April of 1972, isn't it a fact that you were afraid that the neighborhood was going to be blockbusted?

A Yes, sir, that's what I said.

Q Well, I am asking you?

A That's what I said, yes.

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Q I am not asking what you said. I am asking you what you felt?

A I believed the neighborhood was going to be blockbusted, yes, sir.

Q There came a time, sir, when you moved out of that ne' orhood?

A Yes, sir.

Q When was that?

A 1973.

Q '73?

A Yes.

Q Was that the early part of '73 or later on?

A I believe it was mid-'73.

Q Was it after the state grand jury investigation had been wound up?

A I would say it was about that time, yes.

Q About that time, yes, sir.

Q Sir, as a matter of fact, you didn't get along witha great many of your neighbors before you moved out; is that correct?

A No, I got along with your neighbors.

Q Did you get along with Mr. Gebhardt?

A Up untilthe end, before hemoved out, yes.

Q And I think you told us something about there

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was an incident where you punished your child and you found out your child was not in the wrong?

A That's right, sir.

Q You found out because Mr. Gebhardt came over to you and apologized?

A That's right.

Q Becausehe found out the truth?

A Yes, sir.

Q And yet,you told Gebhardt to stay away from you from then on?

A I did.

Q And would you consider it that you didn't have a good relationship with him from then on?

A I would say that's correct, yes.

Q As a matter of fact, that he came over to apologize, you were still angry at him?

A Yes.

Q And did you tell the FBI in February 1974 that you felt that the Gebhardts were selling their house for spite in order to bring about a blockbusting situation?

A I don't recall telling him that they sold it in spite.

Q Well, what did you tell him?

A I believe I told him that there were -- betwee

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Mr. Gebhardt and Mr. Schlesinger being so close friends, that Roy Gebhardt, not getting along with people on the block, that they were forcing a black family into the neighborhood.

Q Did you feel that they were engaged in any conspiracy at that time?

A I thought it was. Yes.

Q I see. As a matter of fact, did you tell any of your neichbors that you thought that Gebhardt was getting back at the Italians in the area?

A Did I tell him he was getting back at the Italians? I wouldn't say that I said that he was getting back at the Italians. I thought he was just getting even with the neighbors because of the way he left.

Q Did you tell Mr. Tortoro that you thought that Gebhardt was getting back at the Italians and that's why he was selling or renting to a black?

A If I talked to Mr. Tortoro about it -- and I probably did -- I -- I don't remember. I don't remember the saying, getting back at the Italians.

Q Well, do you remember what you did say to Mr. Tortora?

A No, sir, I don't.

(continued next page)

Q Sir, did you ever become aware of the fact that the Charles family had sent a letter to the Civilian Complaint Review Board as a complaint against you?

A Not until it appeared in the papers.

Q When would that have been?

A I believe it was last week. In one of last week's articles.

Q That was the first time you heard about that complaint?

A Yes.

Q I see.

To your knowledge -- well, the police never asked you any questions about that letter or about those incidents?

A Nobody from my department ever contacted me about that letter.

Q From October '72 to now, no one from the Police Department has ever asked you one question about your behavior in regard to those incidents?

A Not in that record to those instances in regard to that letter.

Q Well, have you been questioned by any members of the Department other than Detective Corbett about any of the indicents of telling -- about that which you are telling

us about here today?

A I believe some members from the D.A.'s office came down and I had an interview with them.

Q Which DA's office?

A Richmond. I believe Richmond County DA.

Q I see. Was there a stenographer present at that interview?

A Stenographer? I can't say that there was. No.

Q That would have been when? In April '72?

A When the investigation was commenced, sir.

Q I see. Would it be fair to say that you didn't give them any useful information at that time?

A That's right.

Q And would it be fair to say that in March of 1974, when you signed that written statement for Agent Savadel, that was the first time you gave forth a great deal of useful information?

A Yes, sir.

Q And in March of 1974, your memory was better as to events than it is today?

A I would say that is correct.

Q Now I think Mr. DePetris asked you about an incident when the house was flooded?

A Yes, sir.

Q Is that correct?

A Yes.

Q And you told us under oath about a conversation you had the next day?

A Yes, sir.

Q Is that correct?

A Yes.

Q Who was that conversation with the next day?

A As best as I can recall, it was Mr. Anzalone and Mr. Lombardi.

Q Well, you're using the term, as best as you can recall. Do you have some hesitancy about recounting that conversation?

A I remember just a short conversation with Mr. Lombardi.

Q All right. Now it's only Mr.Lombardi that you had the conversation with?

A I believe that he came with Mr. Anzalone.

Q Didn't you say last week on direct examination that it was Mr. Anzalone and Mr. Lombardi who said something to you?

A If that's what I said, that's what I said.

Q Now you are telling us it's one of the two?

A No. Two men were there.

Q Who spoke?

A Mr. Lombardi.

Q But didn't you say last week that both men spoke?

A No, sir.

Q You didn't?

A No. I don't recall mentioning Mr. Anzalone saying anything.

Q As a matter of fact, sir, as you sit on this witness stand now --

A Yes.

Q -- you don't know anything about who did this flooding; is that correct, sir?

A I recall the conversation with Mr. Lombardi regarding that flooding.

Q I ask you to think back now to March 6 of 1974 when you -- March 5th, when you signed a written statement. Do you remember if you were asked any questions about the flooding on that date?

A Yes, sir.

Q And do you remember if Agent Savadel asked you questions about the flooding?

A Yes, sir.

Q And do you remember telling Agent Savadel that you know nothing about who did the flooding. Do you remember

that, sir?

A At that time, yes.

Q After you signed the statement on March 5th, 1974, did you receive any communication from the U.S. Attorney or from the FBI as to whether they were satisfied with your statement?

A As to whether they were satisfied with it?

Q Yes.

A They never contacted me and told me they were satisfied with it.

Q They never told you anything?

A As far as being satisfied, no, sir, I can't recall. I can't say that they did.

Q You never asked if they were satisfied with the statement?

A No, sir.

Q Is it your testimony now that the following morning only one of those two persons said something about the flooding?

A Said something about the flooding?

Q That's correct.

A The best I can recall, yes.

Q So then in March of 1974 you didn't tell Agent Savadel anything about this conversation in regard to the

flooding; is that correct?

A When I gave Agent Savadel the statement, I didn't recall anything at that time, no.

Q At that time?

A No.

Q But there came a time later on when you recalled something?

A Yes, sir.

Q Am I correct?

A Yes.

Q Would that have been in September of 1974 when you gave another statement?

A That's what it's dated, that's when I gave it.

Q Does it appear --

A If that's when it's dated, that's when I gave it.

Q I see.

Well, at that time, in September of 1974, was your memory better than it is today?

A I would say it is. Yes. It was.

Q It was better than it is today?

A I would say so.

Q I see.

Do you remember telling Agent Savadel in September of '74, I recall one of them might have said that they had

something to do with the water damage. I'm not positive that this was said, but there is something in my memory to this effect?

A Yes, sir.

Q So that in September of '74 you were not positive that this was said?

A That's correct.

Q And it was just something in your memory at that time?

A That's correct.

Q Was it the same something in your memory which tells you that Morreale was present at the BB gun incident?

A I remember something being said at that particular incident, sir.

Q Can you tell us now today that you are positive that something was said?

A Regarding this water damage the next day?

Q Yes.

A Yes, sir.

Q But you were not positive in September of '74?

A No, sir.

Q And today there is not something in your memory -- you have total recollection that there was a conversation?

A I remember one man saying something regarding

the water damage.

Q Did you ever -- did you have extensive discussions with the U.S. Attorney and with Agent Savadel in preparation for your testimony here?

A Extensive? I went over the testimony a couple of times.

Q I see. And is one of the items that you went over in this discussion in regard to water damage?

A Yes, sir.

Q And did you go over that with Mr. De Petris?

A YEs, sir.

Q And in regard to that particular discussion, did he show you your March '74 FBI report?

A Yes, sir.

Q Did he show you your September of '74 FBI report?

A Yes, sir.

Q Were there any discussions about the discrepancies in those reports and what you were going to say in Court today?

A I was not told what to say, sir.

Q That's not what I am asking you, sir. I am asking you if there were any discussions about the discrepancies in thos reports?

A I am sure they were pointed out to me.

Q They were pointed out to you?

A I would say they were. I am sure they were pointed out to me.

Q You had time to reflect upon those discrepancies before you testified here?

A Yes, sir.

Q Were you told that you were going to be cross-examined by defense counsel as to those discrepancies?

A Was I told?

Q Yes.

A Yes, sir.

Q And it doesn't come as a surprise that I am asking you questions about these items?

A No, sir.

Q I ask you now, sir, is your memory better today as to the flooding incident than it was in September of 1974?

A I would say, no, sir.

Q Do you remember if you heard any water running when you were outside with these two individuals?

A No. I can't say that I do.

Q You don't remember if you did hear water?

A I don't remember hearing water running at that time. No, sir.

Q You don't remember?

A No, sir.

Q Well, you said that there was some discussion by one or more of these individuals about closing the door?

A Yes, sir.

Q Is that correct?

A Yes.

Q Do you remember who asked you to close the door?

A Who asked me to close the door?

Q No. Who mentioned about closing the door?

A Mr. Lombardi.

Q And what did you say at that point?

A I told him to stay away from the property, and that he was crazy if he went over there.

Q Because you felt that he would get in trouble if he went over there?

A That's correct.

Q Sir, during the various times that you spoke to the FBI -- well, strike that.

You gave a statement in September of '74; is that correct?

A If that's when it's dated, that's when I gave it.

Q Do you recollect what the circumstances of your giving of that statement were at that time?

A What the circumstances were, sir?

Q Yes.

A I don't understand. What do you mean by that?

Q Well, were you called down to give a statement?

A No, sir.

Q Was it a short time before you were to go into the Federal Grand Jury?

A I would say so, yes.

Q Incidentally, before you went into the Federal Grand Jury, did you review the statement of 19 -- of September of 1974?

A I can't be positive, but I would say I did.

Q You did review that?

A I would say I did. I can't be positive.

Q I see. Now, would you say that you gave the same information in a Federal Grand Jury in '74 as you did in that September statement of '74?

A In there I don't believe I made mention of a conversation. Or I did make mention of a conversation. I would say, yes.

Q And you told the Grand Jury there was something in your memory, but you weren't positive in regard to that conversation?

A I don't know if I said it in those exact words.

Q Well, are the words you chose to use in this

courtroom today?

A Th words I chose to use in this courtroom are that Mr. Lombardi had said that to me and I made a statement to him.

Q And you are positive of that today?

A Yes, sir, I am.

Q I see.

Now, sir, the night that a fire occurred at the 351 Milton Avenue residence, did you have occasion to have a loud argument or a fight with a police officer who came up?

A A loud argument?

Q Yes.

A Yes. I had an argument with a police officer.

Q You did?

A Yes, sir.

Q This was a police officer who was trying to help the people in the area?

A I would say, yes.

Q At that time?

A Yes.

Q I see.

Now, sir, prior to your giving your first statement to Agent Savadel, I believe you mentioned that your sister-in-law had been interviewed by the FBI; is that correct?

A That's correct.

(Continued next page)

BY MR. AGULNICK:

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Q And when your sister had been interviewed by the FBI -- well, did she relate the substance of that interview?

A I would say she did.

Q She did?

A I would say she did. Yes.

Q Did she tell you whether she hurt you in any way during that interview?

A I would say she said she didn't.

Q She didn't?

A Yes.

Q Have you told your sister about the paint splashing incident?

A My sister-in-law. No sir.

Q Excuse me. Your sister-in-law.

A No.

Q Had you told her about any of the meetings that you are telling the jury about?

A I would say not.

Q You would say not. Are you sure of that?

A I would say -- I would say I did not tell her anything.

Q Well, did you tell your wife about these items?

A No sir, I did not.

Q Now, this night that you told us about the -- the flooding, you said before that the door opened very briefly and you saw two individuals running down the street; is that correct?

A I believe it was two people. Yes sir.

Q Okay. Now, can you show us on Mr. DePetris' chart the exact location that you saw these two individuals at your point of first observation?

A I can't.

Q Can you show us approximately where they were?

A Approximately.

Q SUrely.

A I would say about this area.

Q That would be somewhere in between 349 and 351?

A Somewhere around there, yes.

Q Did they appear to be running toward Tyson Lane?

A Yes, they did.

Q Where were they the last time you saw them?

A I think the only time I saw them was right in this general area.

Q Were they running very quickly?

A From what I could see, yes.

Q Which side of the street were they on?

A Same side of the street as Charles' house.

Q But they were running, you would imagine, toward Tyson Lane?

A Toward Tyson Lane.

Q Are you sure they were two persons?

A No sir, I can't be sure.

Q But didn't you tell us on direct examination that you saw two people running?

A I believe there was two people, sir.

Q You believe?

A Yes sir.

Q But it could have been three?

A I don't know, sir, if it was three or not.

Q Could it have been four?

A I believe it was two people.

Q Were they walking or were they running?

A They were running, sir.

Q You remember testifying under oath in the federal grand jury and Mr. DePetris was asking you various questions?

A Yes sir.

Q You gave various answers?

A Yes sir.

Q At that time?

A Yes sir.

MR. AGULNICK: Page 8.

Q Do you remember being asked this question and giving this answer:

"Question: While the door was open, did you see anything?

"Answer: I saw two to three men walking back or running down the block toward Tyson Lane."

Do you remember being asked that question and giving that answer?

A I remember being asked the question. I don't remember saying, two to three. I believe I said two men.

Q You said two?

A I believe I said --

Q What about, walking back or running down?

A Walking back or running down?

Q Yes.

A Would you be more specific?

Q Well, I can only be as specific as the answer in the grand jury minutes.

A I believe I saw two individuals -- two people running toward Tyson Lane.

Q And then you deny saying that I saw two to three men walking back or running down the block toward

Tyson Lane.

You deny making that statement?

A No sir, I don't deny it.

Q Well, did you make that statement?

A If it's in the grand jury minutes, I made it.

Q I see. Was your memory fresher on November 12th of '74 than it is today?

A Yes sir.

Q WELL, does that refresh your recollection now?

A I don't remember saying two or three. I thought I said two men.

Q I see.

MR. AGULNICK: I ask Mr. DePetris if he will stipulate that I am reading accurately from the grand jury testimony that day.

MR. DE PETRIS: So stipulated, your Honor.

MR. AGULNICK: Thank you, sir.

Q Sir, the solicitation that you told us about before, to your knowledge, was there any money ever actually received any party in regard to this plan to buy the house?

A No sir.

Q None at all?

A No.

Q Now, the night that the fire occurred, did you

have a conversation with Mr. Anzalone?

A Yes sir.

Q And did Mr. Anzalone indicate to you and other persons at that time that he had called the fire department to report this particular fire?

A I remember him indicating to me -- I don't know if it was to other people.

Q He told you that he reported a fire that he had seen; is that correct?

A That's correct.

Q And, as a matter of fact, did he tell you he was very upset because the fire engines didn't come at once and that he had to call back another time?

A I don't remember him saying he had to call back a second time. I remember him saying he received a hard time when he made the phone call.

Q I see. And did you tell him to report that matter to the fire chief?

A I did, yes.

Q Did he say he was going to do that?

A I don't remember if he did or not. No.

Q I see. Was there anything unusual about Mr. Anzalone's behavior that night that you can recollect?

A No sir, I can't say there was.

A Storm screen with two locks on the side.

Q Then what did you do?

A I looked out the window and I saw four men standing on the sidewalk.

Q At this point in time what were the lighting conditions?

A Very good. The street lights were on.

Q There were street lights on?

A Yes, plenty of lights.

Q You were able to see?

A Yes.

Q Did you recognize these men that you saw on the street?

A Yes.

Q Who were they?

A Tony and Al and Nick and Bob.

Q When you say Tony, who do you mean?

A Anthony Vivelo.

Q Do you see him in the courtroom?

A Yes.

Q Is that the individual you pointed out before?

A Yes.

Q When you say Al who do you mean by Al?

A The last one on the right.

Q You said Bob and Nick. Who do you mean by them?

A Bob is the first on the right and Nick is the first on the left.

Q Where did you see these men standing?

A On the sidewalk in front of the empty house.

Q Would youget up from the witness stand and point out on the chart approximatley where you saw them at this time?

A Here, right on the sidewalk.

MR. DE PETRIS: May we have that red pencil?

THE COURT: Yes.

Q Would you place an X mark on the chart at the point where you saw the men standing on that night?

A Here (indicating).

Q Resume the stand, please.

Would you tell us what you observed at this time when you were looking out the window?

A They were standing and they had guns in their hands and they were shooting at the windows of the empty house.

Q Who had guns in their hands?

A They all did.

Q Were you able to see what kind of guns they had?

A I don't know what kind of a gun it was. They weren't regular guns, but they were some kind of guns.

I figured out after that they were BB guns.

Q Did you hear any noise at that time?

A The noise of the guns and the windows breaking.

Q What did the noise sound like?

A Kind of a ping. It wasn't a regular bullet.

Q Were you familiar at the time with the sound of a regular gun?

A Yes. I belonged to a rifle club and I did shoot a gun and rifle, so I know the sound of a regular gun.

Q Approximately how long did this continue?

A Maybe a few minutes after I looked out, then they stopped and started walking away.

Q Did you observe anybody else on the street at that time?

A No, no one.

Q Did any of these men see you at the time?

A Yes. One of them definitely did --

MR. FLAMHAFT: I object. That's a conclusion, your Honor.

It is calling for a statement of mind of somebody's actions.

MR. DE PETRIS: I will rephrase it.

Q Tell us what you say in that connection.

A I saw one look up at me and did see me looking out the window. I don't think it was because of the noise of opening the window, maybe they just realized someone was looking.

Q Who was that?

A That was Nick.

Q Then what did these men do?

A They started walking towards Tony's house.

Q What did you do?

A I shut the window and tried to get back to sleep.

Q Could you point out on the chart -- withdrawn. Where were the men at the last point in time that you saw them before you closed the window and went back to bed?

A Going across the street approximately in the middle of the street.

Q Did there come a time when you were interviewed by the Federal Bureau of Investigation?

A Yes.

Q Was it a particular individual who interviewed you?

A Mr. Savadel.

Q Do you recall when the first time you were interviewed by the FBI?

A February of 1974.

Q Did they ask you at that time whether or not you had any knowledge of vandalism at the house?

A Yes.

Q What did you say?

A No.

Q Was that the truth?

A No.

MR. AGULNICK: I object. He's impeaching his own witness.

THE COURT: Overruled.

Q I show you Government's Exhibit 6A in evidence, Mrs. King. I would ask you if you could point out on the exhibit where the men were standing when you first saw them that night.

A Right here on the sidewalk.

MR. DE PETRIS: May I ask that the witness stand down in front of the jury and point out where it was on Government's Exhibit 6A.

THE WITNESS: Right on the sidewalk in front of the house.

MR. DE PETRIS: May I pass this exhibit to

the jury.

THE COURT: You may.

(Government's Exhibit 6A was thereupon passed to the jury.)

MR. DE PETRIS: Your Honor, I have no further questions.

MR. FLAMHAFT: On behalf of the defendants may we have five minutes in order to read certain material before questioning this young lady?

THE COURT: All right, we'll take a brief recess for five minutes.

(Jury withdrew and a recess was taken.)

(Continued on the next page.)

(The Jury entered the courtroom at 11:22 A.M.)

CROSS EXAMINATION

BY MR. AGULNICK:

Q There came a time when you moved from the Milton Avenue address?

A Yes.

Q Was that about the same time that Gerald Maddalone moved?

A I think a little after. I'm not sure of the exact date.

Q But at approximately the same time of year; is that correct?

A Yes.

Q And prior to your moving what address did you live at?

A 357 Milton Avenue.

Q What address did Gerry Maddalone live at?

A 355 Milton Avenue.

Q Was that an attached duplex that you shared with him?

A Yes.

Q During the period that you lived on Milton Avenue there was a period of time when your husband was not living at home.

A Right.

Q Is that correct?

A Yes.

Q For how long a period wasn't your husband living at home with you?

A I think it was three or four months.

Q Would it be correct to say that during that period of time Mr. Maddalone used to do various chores for you?

A Definitely not.

Q And you never called upon him to help you in any way?

A No, I'm a very self-reliant girl and pretty handy and can manage my business.

Q Would you say that you were at that time in 1972 you were close to your sister?

A Not really. I'm closer to her now than I was then.

Q ANd now, the place you have moved to, without giving us the address, how far is that from Maddalone's new home?

A Far, fairly far. It's about a fifteen-minute drive.

Q Is that also in Staten Island?

A Yes.

Q In April of 1972 you were interviewed by a patrolman, Carl Kuhn.

A When was this?

Q In April of '72.

A Somebody did come.

Q A police officer came and interviewed you at that time?

A I don't know if it was a police officer. Wasn't it a fire marshal?

Q Was his name Ramos?

A I don't remember.

Q At that time did you tell that fire marshal about this incident involving the BB guns?

A No.

Q You did not?

A No.

Q Was there also a time when a police officer interviewed you?

A I don't remember the police officer. I remember the fire marshal, but I don't remember the policeman.

Q It would have been a detective Robinson from the DA's office of Staten Island together with this patrolman Kuhn.

A I don't remember that.

Q I ask you to look at --

MR. AGULNICK: May I have this report marked for identification, your Honor?

MR. DE PETRIS: It has an exhibit number.

MR. AGULNICK: 3500-12C.

Q I ask you to look at 3500-12C, which is a report of an interview, and ask you if you -- if that refreshes your recollection.

A Yes, sir. I know somebody came out. I don't know if it was once or twice.

Q Have you had an opportunity to look at that report?

A Yes.

Q Can you tell us now if in your interview with the police you indicated anything about this incident involving the BB guns?

A No.

Q Now, there came a time in February 1974 when you gave another statement to the FBI. Do you remember that?

A Yes.

Q As a matter of fact, how many statements would you say that you have given to the FBI all tolled?

A Two.

Q And the February of 1974 would have been the

first statement; is that correct?

A Yes.

Q And do you recollect telling Agent Savadel -- incidentally, do you know Agent Savadel?

A Yes.

Q Do you recall telling Agent Savadel that you had no information as to who committed the acts of vandalism?

A Yes.

Q You did tell him that?

A Yes.

Q In February of 1974 were you living with your husband?

A Yes.

Q You were?

A Yes.

Q Did you have a man around the house to protect you at that time?

A Yes.

Q Is that correct?

A Yes. But I was also eight months pregnant.

Q You were eight months pregnant?

A Yes.

Q Now, there came a time when you did give a statement in which you related what happened; is that right?

A Yes.

Q That was in November of 1974; is that correct?

A Yes.

Q I take it you were living with your husband then.

A Yes.

Q And you had a small child at that time?

A Yes.

Q How old was your child at that time?

A She was born the end of March of '74 so she was about eight months old.

Q Now, do you remember where you gave the statement in November of '74?

A In my house.

Q In your house?

A I'm pretty sure.

Q Were you visited at that time?

A By Mr. Savadel, yes.

Q Did you know he was coming?

A Yes.

Q How did you know he was coming?

A Gerry told me.

Q Gerry told you that Savadel was coming to your house?

A Yes.

Q Would it be correct to say that all along the way you had had conversations with Gerry about the various statements which you had given?

A Yes.

Q Did you have a conversation with Gerry when he informed you that Agent Savadel was coming?

A Yes. He told me he was going to come.

Q Did he tell you anything else?

A He told me he had told Mr. Savadel what I had seen.

Q Had you told Gerry what you had seen?

A Yes.

Q When did you first tell Gerry what you had truly seen?

A Shortly after it happened.

Q In 1972?

A Yes.

Q Did Gerry relate to you at that time what he had seen?

A No.

Q He did not?

A No.

Q Well, did he say anything to you in regard to

to that BB gun incident after you had told him what you had seen?

A Yes, he asked me not to say anything. That was one of the reasons why --

Q I see. When you had told Gerry what you had seen did you also tell Gerry that you had seen him there with these other men?

A No.

Q Not at all? Are you sure of that?

A I'm positive, yes.

Q Did Gerry make any comments as to your statement to him that you had not seen him there?

A What? I'm sorry.

Q Perhaps I'm not making myself clear.

I will rephrase the question.

After you had told Gerry -- well, after you had told Gerry what you had seen at the scene of the shooting, did he make any comment?

A As far as what?

Q As to the accuracy of the persons whom you had depicted as being there?

A I don't think so. He just asked me not to say anything.

Q Not to say anything?

A Right.

Q Did he tell you that he was concerned that he would be accused of the BB shooting incident?

A No.

Q Not at all?

A No.

Q Did he tell you at any time that he was concerned about the BB shooting incident?

A As far as he was concerned?

Q As far as he was conerned.

A No.

Q Did he tell you at any time that he was present during the BB shooting incident?

A No, because he wasn't there.

Q Excuse me.

MR. AGULNICK: I move to strike the last part of the answer as not responsive.

THE COURT: All right. I will ask the jury to disregard that last statement.

MR. AGULNICK: Thank you.

Q Did Gerry tell you at any time that he had walked across the street with a group of men and went into a house on Milton Avenue on that night?

A No.

Q When was the last time that you discussed this case with Gerry?

A As far as what? What do you mean the last time?

Q As far as you were going to say in your testimony.

A I didn't.

Q Then you never discussed with Gerry what your testimony was to be?

A Well, he knew what I saw and he knew that that was what I was going to tell.

Q And that was back in your conversation in '72?

A I guess after that.

Q Are you guessing?

A No. We did, but it hasn't been recent.

Q Did you have any discussions with Gerry in regard to a decision that he made to cooperate with Agent Savadel, Mr. De Petris?

A I had no idea.

Q When did you learn that he did make that decision?

A When he told me the FBI was coming over.

Q That would have been in November of '74.

A Well, he said he had spoken to them and they were coming over to speak to me.

Q And he told you -- did you ask him why he had spoken to them at that time?

A He said his conscience was bothering him.

Q Did you ask him if he tried to work out any type of deal as far as he was concerned?

A He said he had no deal.

Q He had no deal in November of 1974?

He told you his conscience was bothering him and he had no deal?

A As far as I remember, yes.

Q I see. Didyou tell him at that time, Gerry, since you're cooperating you ought to work out some sort of a deal to help yourself?

A I did not speak to Gerry that much.

Q I'm just asking you whether you told him that?

A No, I didn't.

Q And when you spoke to Gerry in November of 1973 --excuse me, 1974, did he tell you when he first gave a statement to the FBI?

A No. I don't remember if he did. If he did I don't remember when it was anyway.

Q Was it sometime before your conversation in November of '74?

A Yes, he said he had spoken to them.

Q Did you ask him what he had stated or said to the FBI?

A No, he didn't tell me.

Q You didn't ask him?

A He was talking much.

Q Did you ask him? Were you curious to know?

A I really don't remember if I asked.

Q Now, in February of 1974, after you gave a statement to Agent Savadel, did you go over and tell Gerry that the FBI was in the picture and they were investigating the case?

A I'm sure I told him, but I don't think it was Gerry in the course of talking. An FBI agent doesn't come to your house every day and I'm sure I told Lisa.

Q You told Lisa?

A Yes.

Q Did you tell Lisa to be on the lookout and have Gerry be careful because the FBI was not in the picture?

A No.

Q Well --

A I don't remember what I said. Just that the FBI came.

Q Did you tell Lisa that you didn't give the FBI any information that would hurt Gerry or Lisa?

A I had nothing to tell that would hurt either one of them anyway.

Q Now, when Agent Savadel visited you in November of 1974 did you say he made an appointment to come to see you, or he just came over?

A No, I -- I don't remember. I don't know if he called first. I don't remember.

Q You don't know if he called first or he just popped in in November of '74?

A I don't remember.

Q Did you have any conversations with Agent Savadel or Mr. De Petris or anyone else from the FBI in between your February statement and your November statement in 1974?

A No.

Q Now, when Agent Savadel came over to your house in November of '74, for about how long would you say the interview lasted?

A I don't remember.

Q Would it have been a matter of hours or minutes?

A An hour or an hour and a half. I don't know.

Q Did Agent Savadel tell you that Gerry was cooperating and trying to work out an arrangement for himself where he could save his job and not go to jail?

A No.

Q Did there come a time when you found out that Gerry was trying to find out such an arrangement?

A No.

(Continued on the next page.)

Q Are you telling us now up until the time that you testified here today, correct me if I am wrong, that you've had no knowledge about any deals that Jerry Maddalone had worked out with the Government?

A The only thing I found out is what I read in the Staten Island Advance.

Q You never had any discussion with Jerry about what you read in the Staten Island Advance?

A No, I haven't been speaking to him.

Q You haven't been speaking to him?

A No.

Q When did you read about it in the Advance?

A It is in it every day.

Q Are you talking about the last couple of weeks?

A What happens has been in the Advance. I have been reading it.

Q Have you been speaking to Lisa about Jerry's welfare?

A No, not really. He was doing okay. That is it.

Q When for the first time were you notified you were going to be a witness in this particular case?

A Last November when I went before the grand jury.

Q And?

A I knew I was eventually going to be a witness.

Q At that time you knew that Jerry would be a witness?

A Yes.

Q During that time, November to now, you had no discussion or conversations with Jerry in regard to your being a witness and his being a witness?

A Of course we talked, nothing very dramatic.

Q I am not asking for dramatics. I am asking you about what the substance of these conversations has been.

A Jerry did not tell me what he was going to say. I found out --

Q Madam --

MR. DE PETRIS: May the witness finish answering the question?

Q I think the question is fairly clear.

THE COURT: Do you want it repeated or do you want to reframe it?

Q Do you understand what the question is?

A Yes. Jerry did not tell me what he was going to say. I found out what was going on from reading the papers.

Q Did you --

A Can I say something else?

Q No.

Did you tell Jerry what you were going to say?

A No.

Q So then your conversations with Jerry had just been very general conversations?

A Exactly.

Q Never been any mention of the BB gun incident between you and Jerry?

A Of course, I told him what I saw.

Q Did he tell you that what you had seen contradicted a great deal of what his testimony would be?

A No.

Q Did he express any concern after hearing your narrative as to what you had seen?

A No.

Q Now, in November of 1974, you did give a statement; is that correct?

A Yes.

Q When you gave this statement, did Agent Savadel indicate to you that Jerry was a possible co-conspirator in this particular case?

A I don't think so. I can't say for sure.

Q You can't say for sure?

A I don't think so.

Q You don't think so?

A No, as a matter of fact, I can clarify that.

I found out that Jerry was an unindicted co-conspirator in December, again from the STaten Island Advance.

Q December '74?

A Just before the whole case, it was in the paper. That's when I found out.

Q You never found out from your sister?

A No, I don't think she knew anything. She knew when it hit the paper.

MR. AGULNICK: I move to strike that last remark out.

THE COURT: All right, the jury will disregard the last remark.

MR. AGULNICK: Thank you.

Q Now, you stated today under oath that you were in your bed and there came a time when you went to the window?

A Right.

Q You looked out?

A Yes.

Q You say you saw four individuals with pistols?

A Yes.

Q You are sure of that number?

A Sure of the number of pistols or men?

Q Number of men and the number of pistols.

A Yes.

Q Did you see all four of these individuals actually discharging or shooting the pistols?

A Yes, sir.

Q And for about how long a period would you say that you saw these four men on the street before they walked away to another location?

A A few minutes. It's hard to say how long. It was happening for awhile before I got up --

Q I am asking you only what you saw.

A A few minutes.

Q After you saw this incident, I take it you did not report it to any authorities?

A No, I didn't.

Q Did you relate this incident to anyone else?

A No.

Q At that time?

A No.

Q At that time, I assume you knew that Jerry Maddalone was a New York City police officer?

A Yes.

Q Is that correct?

A Yes.

Q Did you tell him at that time what you had seen?

A It wasn't at that time --

Q At about the t6me that it happened or days later?

A Yes.

Q You did tell him?

A Yes.

Q About how long after the incident did you tell him?

A I think it was the next day.

Q The following day?

A Yes.

Q I see.

Now, there came a time when you say -- well, strike that.

Did you see John Morreale amongst that group of four men?

A No.

Q Did you see Gerald Maddalone?

A No.

Q May I finish?

A Yes.

Q Did you see Gerald Maddalone amongst that group of men?

A No.

Q Did you see Gerald Maddalone a few feet away from those men?

A No.

Q Did you see Gerald Maddalone at any time that evening on the street?

A No.

Q Did you see Gerald Maddalone at the time when you saw this group of men walking away towards another location?

A No.

Q You are certain of that?

A Yes.

Q Did you expect that I was going to ask you that question today?

A What question?

Q About seeing Jerry Maddalone.

A You asked about John.

Q Before you got on the stand this morning --

A Not really.

Q You didn't expect that I would ask that question?

A No, just it followed, after John you started the same way.

Q You had no discussion with the United States Attorney or Agent Savadel about the possible questions that the defense could be asking you?

A Yes, some.

A No, sir -- as he was taking my statement, of course.

Q And to the best of your recollection, Mrs. King, by statement, of course, how many notes or memorandum did Agent Savadel make as you were speaking with him?

A I don't know.

Q Were there many?

A I don't know.

Q More than ten?

A I don't think so.

Q MOre than five?

A I don't know, probably not.

Q In any event, this interview occurred at your dwelling not on Milton Avenue.

A Right.

Q And you stated that you still reside on Staten Island; isn't that correct?

A That's correct.

Q And as you know Lisa and Gerry resided on Edgegrove Avenue; isn't that correct?

A Yes.

Q And you live on the south shore of Staten Island; isn't that correct?

A Yes.

Q And that is within easy travel distance either along Richmond Road or Hyland Boulevard; isn't that correct?

A What has that got to do with anything. I can get to anyplace on the Island within fifteen minutes. My other sister lives on Staten Island and I could get to her house quicker.

Q And I assume you visit Gerry and Lisa?

A I visit all my sisters.

Q And on occasion I assume Lisa visits you at your dwelling?

A I should certainly think so.

Q Thank you.

A You're welcome.

Q Now, when you were first visited by Agent Savadel and you lied, did you immediately contact your sister Lisa?

A Lisa.

Q Excuse me. Lisa.

A Right.

Q Did you contact her?

A I don't remember when I told her, but I told her. You don't get a visit from the FBI every day of the week or every day of the year.

Q Did you call Lisa by phone or did you visit her?

A I called her by phone.

Q And I assume, Mrs. King, that you discussed with Lisa the sum and substance of the interview between you and Agent Savadel with Lisa.

A Why shouldn't I? She's my sister.

Q Thank you.

A You're welcome.

Q And at that time that you called, if now, was Gerald at home with Lisa?

A I don't remember.

Q When for the first time, Mrs. King, did you discuss with Gerald the visit of Agent Savadel to you?

A I didn't, lisa told him.

Q And during that period of time -- strike that. Lisa told her husband about the interview with Savadel; is that your statement?

A Yes.

Q Did Gerald call you?

A I don't think so.

Q Did he come to visit you?

A I don't think so.

Q Did you ever speak to Gerald about the visit by Agent Savadel?

A Speak to him, what, after it happened?

Q After the first visit by Agent Savadel.

A I don't remember. We were -- we see each other and I'm sure the conversation came up.

Q And I assume it was indeed a casual conversation with GErald.

A Casual in what way?

Q Just in passing, that Agent Savadel had been to your home to make inquiries about happenings on Milton Avenue; isn't that correct?

A We knew then that the FBI was in on the case and they would be making the rounds.

Q And prior to this time you had never made any contact with Mr. Braceded of the Richmond County District Attorneys office; is that correct?

A Correct.

Q Now, you said to Gerald, if you did, "The FBI is making the rounds?"

A Just they were checking up trying to get some information on the case.

Q And when you said that to him did Gerald show any concern, did you detect any emotion when you said that to Gerald?

A I don't think so. He -- emotion in what way?

A Did any look come about Gerald's face of any

kind or nature, any concern?

A I don't remember. I don't think so.

MR. DE PETRIS: May I suggest that Mr. Crecca step back, maybe the witness will speak louder.

MR. CRECCA: I will. Thank you, Mr. De Petris.

Q Did Gerald ask you when you first conversed with him about the visit from Savadel, what Savadel had asked you, the sum and substance of the conversation?

A Yes, they asked me what was said.

Q And did you tell Gerald the sum and substance of the conversation?

A Yes.

Q And did you tell Gerald that you lied?

A Gerry knew that. I didn't have to tell him.

Q Did you tell Gerald that you lied?

A No, I didn't tell Gerry that I lied.

Q And this entire incident received much publicity in the State Island Advance from April of '72 up to the time and thereafter when Savadel came to you; isn't that correct?

A Yes.

(Continued on the next page.)

Q And you had known that Gerald was called down to the Richmond County District Attorney's office before the grand jury, isn't that correct?

A Yes.

Q And you had known that Gerald was a suspect; isn't that right?

A No.

Q That was never mentioned in the local papers?

A No, not that I remember.

Q Did he tell you that he was a supect?

A No.

Q Did Lisa tell you that he was a suspect?

A No.

Q When did you learn that Gerald was called down to the Richmond County District Attorney's office?

A I don't remember.

Q Was it after the statement that you gave to Savadell or before you gave the statement to Savadell?

A Before.

Q And before you took the witness stand today, did you discuss with Gerald what you were going to testify to, yes or no?

A No.

Q And you still live out on Staten Island; is

that correct?

A Yes, that is correct.

Q You still have a telephone; is that correct?

A Yes.

Q And you still are pretty close to Lisa; is that correct?

A Yes.

Q And of course, you are concerned about Gerald's welfare, isn't that correct?

A As I would any other human being.

Q Thank you.

Do you happen to be a godmother to any of their children?

A Yes.

Q Thank you.

A You're welcome.

Q And you realize that during the course of this entire happening, April '72, that Gerald's liberty was in jeopardy; is that correct?

A No.

Q Now, after February of 1974, you learned that Gerald had been questioned by Agent Savadell, isn't that correct?

A I didn't know that in February.

Q Savadell came to you first, isn't that correct?

A Yes, I think so.

Q You in turn told Lisa or Gerald, whatever the case may be?

A Yes, I said that already.

Q Gerald was questioned in March of '74, isn't that correct?

A I don't know when he was questioned.

Q Were you not aware --

MR. DEPETRIS: I don't mean to interrupt Mr. Crecca's examination, but Mr. Crecca keeps walking in front of the witness and I cannot see her.

MR. CRECCA: It's a nervouse habit, excuse me.

Q Were you not aware that Gerald was questioned by Agent Savadell the month after you were questioned?

A I don't remember when it happened. If you say it happened, then okay.

Q Did you discuss with Gerald or Lisa the sum and subsdtanc of his conversation with Agent Savadell, yes or no?

A No.

Q No?

A Not what you are saying.

Q Thank you.

A You told me he had come and that was it.

MR. CRECCA: I move to strike that as not responsive.

Q What did he tell you?

A He was questioned and that is all.

Q Did he tell you the sum and substance of the conversation?

A He didn't tell me word for word.

Q Did he tell you generally what was said?

A Not really, no. I didn't know what was going on.

Q Did he express any concern to you?

A No.

Q No.

A No.

Q Now, after the March '74 interview by Savadell with Gerald, did you see Gerald after that?

A Of course.

Q And you saw Lisa after that?

A Of course.

Q Did you see Gerald and Lisa and their home?

A Of course.

Q Did you see Gerald and Lisa at your home?

A Yes.

Q On frequent occasions?

A I don't know what you call frequent.

Q At least once a month?

A Yes.

Q Twice a month?

A Probably, yes.

Q Of course you were discussing this entire happening with your brother in law and lisa, isn't that correct?

A No, we had another thing to talk about.

Q And subsequent to that, eventually, in November of '74, after he spoke to Gerald, you were again interviewed by Agent Savadell; is that correct?

A Yes.

Q And from February of '74 up until Mary of '74 when Geral was interviewed, how many times did you speak with Lisa and Gerald, to the best of your estimation?

A I don't know.

Q From March of '74, when Geral was interviewed by Agent Savadell, until you were ultimately interviewed in November of 1974, how many times had you spoken with Gerald and Lisa?

MR. DEMETRIS: Yor Honor, we have been over this and I would object on the grounds of repetition.

THE COURT: I will ask Counsel not to be repetitious.

Q More than ten times?

A i'm sure.

Q In November of 1974, after conversing with your sister and after conversing with Gerald, you then changed your story to Agent Savadell; isn't that correct?

A Yes.

Q Thank you.

Now, at the time of this alleged happening, the shooting incident that you have testified to, you had stated under examination, if I'm not mistaken, by Mr. Depetris and my brethren at the bar that at no time did you see your brother in law at or near the locale; is that correct?

A Yes.

Q And I think you stated, and correct me if I am incorrect, that you were sleeping and you were awakened?

A I wasn't sound asleep. I was reading and I just put the book down and started to doze off or with my eyes closed.

Q And you said all four men had pistols in their hands, is that correct?

A Yes.

Q And of course that would include Robert Barbieri?

A Yes.

Q And you did not see Mr. Morreale at or near the

locale?

A No.

Q Are you aware that Gerald, in his testimony, stated that at no time did he see any weapon of any kind or nature in the hands of Robert Barbieri?

A I don't care what anyone else said.

Q After you were at the window, did you return to your bed?

A Yes.

Q Did you fall off to sleep immediately?

A No.

Q Did you hear any motor vehicle pull up into the driveway wherein your brother in law resides?

A No.

Q When did the shooting stop, if you know?

A A couple -- Two or three minutes after I looked up.

Q And when they saw you --

A One saw me.

Q When one saw you, if that be your testimony, did they continue to shoot?

A Yes.

Q Where did they go after they left the front of 351 Milton Avenue?

A They were walking across the street toward Tony's house?

Q What?

A Walking across the street towards Tony's house.

Q That is when you departed and went back to your bed?

A Yes.

Q Do you remember being this question -- Strike that.

Before you testified before the Federal grand jury, were you told by Mr. Depetris what questions to expect?

A YEs.

Q And you reviewed your testimony with Mr. Depetris before you went into the grand jury, is that correct?

A Yes.

Q And did you review your testimony before you took the witness stand today, yes or no?

A Yes.

Q Page 11, line 25: "Question: They went to Tony's house?

"Answer: Well, I don't know where they were going, but they were together."

Was that question asked and did you give that answer, yes or no?

A Yes. I didn't say they went into Tony's house, they were going towards Tony's house.

MR. CRECCA: Will the District Attorney stipulate that the questions I have read, your Honor, and the answer that was given by this witness is part and parcel of the Federal grand jury testimony?

Mr. Depetris?

MR. DEPETRIS: If Mr. Crecca will stipulate that other questions on that same subject were asked and answered as given on page 9 of the grand jury testimony, I will so stipulate.

MR. CRECCA: I think that is an unfair statement. This is cross examination and I am just concerned with one question and one answer.

MR. DEPETRIS: You can't have only part, that is the basis --

MR. AGULNICK: I will stipulate any questions and answers read from the grand jury minutes are correctly read by any part.

THE COURT: All right.

MR. CRECCA: Fair enough.

Q Did you actually see them shooting at the front window of 351 Milton Avenue?

A Yes.

Q What?

A Yes.

Q And your statement to Mr. Savadell -- I'm sorry, Agent Savadell, in November of 1974, did you not say that you figured the men were shooting at the front window at 351 Milton Avenue?

A Maybe it was the wrong choice of words.

Q Thank you.

By the way, Mrs. King, you want to see Gerald retain his position with the Police Department, is that correct?

A I don't know what is going to happen to Jerry.

Q Do you want to see Gerald retain his position with the Police Department of the City of New York, yes or no?

A Yes. Why not?

Q Do you want to see Gerald Maddalone prosecuted for any crime, yes or no?

A I don't know.

Q And you love your sister, is that correct?

A Don't you love your sister?

Q You love your sister, isn't that correct?

A Yes.

Q You love your godchildren, isn't that correct?

A I love all my nieces and nephews and all my

sisters.

Q You would not want to see your nieces or nephews of the Madddalone family without a father for a period of time; isn't that corect?

A Nobody would like to see something like that.

Q Thank you very much.

And you would do anything --

A No.

Q No, thank you very much.

A You are welcome

Q You would not take this witness stand and lie?

A Of course not.

Q As you lied when you first spoke with Savadell?

A There is a slight difference.

Q As you lied when you first spoke with Detective Robinson?

A As I said, there is a slight difference.

Q Thank you.

A You are quite welcome.

Q You know now this is for all the marbles?

A What do you mean by all the marbles?

Q We are down to the moment of truth; isn't that correct?

A Yes.

Q To who goes and who stays?

THE COURT: Wait a minute, Counsel. You ask questions that the witness can understand. We haven't come to speechmaking yet.

MR. CRECCA: I will withdraw it.

Q You know that this proceeding is very crucial to Gerald, isn't that correct?

A i would say it's very crucial to everyone.

Q Including Gerald, whom you love?

A I don't love Jerry.

Q Thank you very much.

A You're welcome.

MR. CRECCA: Nothing further.

THE COURT: All right, members of the jury. We can recess now to lunch.

MR. DEPETRIS: We might be able to finish with the witness.

MR. AGULNICK: I have a couple questions in addition.

THE COURT: We might break and then come back. Recess for lunch. Two o'clock.

(Whereupon, a lunch recess was taken at this time until 2 o'clock this afternoon.)

(continued next page)

Q Mrs. King, do you recall on cross-examination you were questioned about having --

MR. AGULNICK: I'm sorry. I was asking for permission to ask a couple of additional questions before redirect.

THE COURT: Why don't you let it go and we'll see.

Let counsel proceed.

MR. DE PETRIS: If it's going to be additional questions on cross--

THE COURT: I will give you another chance if he brings out anything.

REDIRECT EXAMINATION

BY MR. DE PETRIS (Continued):

Q Do you recall being questioned about having lied to the police officer and fire marshal in April of '72 and to Agent Navadel when you were first interviewed by him in February of '74?

A Yes.

Q Do you recall you testified there was a slight difference between, I believe those were your words, between lying on that occasion and lying in court?

A Yes.

Q And what did you mean by that?

A Well, if it's under oath, it's more than a

slight difference, it's a big difference.

Q Now, when you were interviewed by the FBI were you under oath?

A No.

Q And I think Mr. Crecca asked you whether or not you had been prosecuted for lying to the FBI and you said no.

A That's correct.

Q Has the Government made any promises to you in connection with your testimony?

A Of course not.

MR. DE PETRIS: I have no further questions, your Honor.

THE COURT: I would like to ask the witness a question or two and then you will have a chance.

The night you said you went to bed, heard the noises and opened the windows, what time did you go to bed?

THE WITNESS: I was reading for a while. I don't remember what time I went to bed exactly. About the time I opened the window it must have been about eleven or eleven-thirty.

THE COURT: That's your best estimate?

THE WITNESS: Yes.

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"Question: Were you ever present with anyone else who shot a firearm at the windows at 351 Milton Avenue?

"Answer: No.

"Question: When I used the word firearm in that last question, I use it in a broad sense like the question which I previously gave.

"With that definition in mind, I ask you again, were you ever present when any other person shot a firearm toward the premises of 351 Milton Avenue?

"Answer: No.

"Question: Were you ever present when any damage whatsoever was done on the front windows at 351 Milton Avenue?

"Answer: No.

"Question: Do you know the identity of anyone who inflicted any type of damage or committed any act of vandalism on the premises at 351 Milton Avenue?

"Answer: No."

Those are the questions and answers with respect to count 3.

I would now read the questions and answers in the grand jury with respect to count 4, the testimony of Albert Anzalone.

"Question: Were you ever involved in any act

of vandalism against the premises at 351 Milton Avenue?

"Answer: No, sir.

"Question: Specifically, did you ever shoot a BB or pellet-type gun at or in the direction of the front windows at 351 Milton Avenue?

"Answer: No, sir.

"Question: Did you ever shoot at the front windows of 351 Milton Avenue and thereby break panes of glass in those windows?

"Answer: No, sir.

"Question: Were you ever present when any person shot any kind of gun towards the windows of 351 Milton Avenue?

"Answer: No, sir.

"Question: Were you ever present when any damage was inflicted upon the front windows of 351 Milton Avenue?

"Answer: No, sir.

"Question: Do you know the identity of anyone who inflicted any type of damage or committed any act of vandalism on the premises of 351 Milton Avenue?

"Answer: No, sir."

Those were the questions as to count 4.

I will now read the questions and answers with respect to count 5, the testimony of Anthony Vivelo.

"Answer: Right.

'Question: Or any attempt with respect to 351 Milton Avenue?

'Answer: Other than the statement I gave you a few minutes ago explaining the answer."

I will now read the questions and answers with respect to Count 9 of the indictment, the testimony of Albert Anzalone before the grand jury.

"Question: Mr. Anzalone, I would now like to direct your attention to your activities on the afternoon and evening of April 21, 22 of 1972.

"That was the night of the fire at 351 Milton Avenue.

"Where were you that afternoon?

"Answer: I would say working.

"Question: Did there come a time when you came home?

"Answer: Yes, the normal time is 6:00, 7:00 o'clock, around that time.

'Question: What would be the last time you were outside that evening?

'Answer: I don't know. It is so long ago. It could be 11:00 o'clock, 11:30. It could be about 10:00 o'clock. I don't know.

"Question: Were you outside after midnight that

right?

"Answer: Outside -- no, I went to the door after midnight to let someone in, yes.

"Question: Who was that?

"Answer: Anthony Vivelo.

"Question: Mr. Vivelo came over to your house thatevening?

"Answer: Sure.

"Question: Do you recall what time that was?

"Answer: I would say it would have to be maybe a little before 12:30, a little after 12:30 roughly, that time.

"Question: Did Mr. Vivelo work thatnight?

"Answer: From 4:00 to 12:00.

"Question: That night you say he came over to your house about what time?

"Answer: I have to say about 12:30. I don't know the exact time, five minutes, one way or the other.

"Question: Approximately 12:30?

"Answer: Approximately, yes.

"Question: What happened when he came over?

"Answer: What happened?

"Question: Yes.

"Answer: He knocked on my door, he needed a

key to get into his house. He couldn't get in. He didn't have no key.

"Question: Would you explain that to the grand jury?

"Answer: He came to my door, knocked on my door, said that he couldn't get into his house because he had no key. He asked to use my telephone. I let him use my telephone and I also gave him a cup of coffee. That's what happened.

"Question: He came in, used your telephone to call his wife?

"Answer; Yes, to wake her up.

"Question: To tell her to unlock the door?

"Answer: Yes.

"Question: Then he had a cup of coffee?

"Answer: Yes sir.

"Question: In any event, to the best of your recollection at this time he came over at 12:30 and left by 1:00 o'clock?

"Answer: Yes.

"Question: After he left your house, called his wife, had a cup of coffee which you say is about 1:00 o'clock, after that time prior to the fire which took place at 2:00 o'clock or shortly thereafter, in that intervening time did Mr. Vivelo come over to your

house again?

"Answer: No.

"Question: You are sure about that?

"Answer: Positive."

I will now read the questions and answers with respect to Count 10 of the indictment, the testimony of Anthony Vivelo before the grand jury.

"Question: Mr. Vivelo, I would now like to direct your attention to the evening of the fire at 361 Milton Avenuewhich had been placed in the early morning of April 22nd.

"What were your hours of duty on that day?

"Answer: I did 4:00 to 12:00.

"Question: In other words, you worked from 4:00 p.m. to 12:00 midnight?

"Answer: Yes.

"Question: Where were you located at that time?

"Answer: Coney Island.

"Question: How long does it take you to get from Coney Island to your home on Staten Island at that hour of the night when you worked a 4:00 to 12:00 shift?

"Answer: Somewhere from twenty minutes.

"Question: When you are working the 4:00 to

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MR. DE PETRIS: The same thing has been recorded a second time, and it may be a little clearer. We will play the same recording again.

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THE COURT: Listen to it again.

(Tape played.)

THE COURT: Now members of the jury, while I already told you that the transcript is not the evidence, but what you hear is, I especially instruct you to disregard the comments of the dispatcher that nobody wants to identify themselves. That is his conclusion. Thatis just a gratuitous expression of opinion, which is not evidence here.

Do you understand that?

MR. AGULNICK: I would stipulate for the record that the voices on the transcript are that of Mr. and Mrs. Anzalone.

MR. DE PETRIS: Your Honor, I would like also for the record to show at this time, when the female's voice said 343 Milton, that 343 Milton Avenue is the address of Albert Anzalone.

I will now collect the transcripts, your Honor?

THE COURT: Yes.

(Pause.)

MR. DE PETRIS: Your Honor, may I inquire as to your Honor's desire --

Q And there came a time when you awakened, is that correct?

A Yes.

Q And evidently you woke up your family; is that correct?

A Yes.

Q Were you fully dressed at that time?

A When I woke them up?

Q Yes.

A When I woke them up I wasn't dressed.

Q Well, were you fully drssed when you left the house?

A Yes.

Q And this fire occurred and you were out on the street, did you notice Mr. Anzalone?

A Yes.

Q Where was Mr. Anzalone the first time you saw him?

A He came over to us, me and my folks from his house.

Q And he asked you and your parents if they would want to come into this house?

A I don't recall what he asked.

Q And he informed you that he had called the fire

department; is that correct?

A That's correct.

Q And did he tell you that they had given him a hard time because he didn't give his name?

A No.

Q Did you notice where Anthony Vivelo was after the fire occurred?

A I didn't notice him at all, really.

Q Didn't notice him at all?

A No.

Q Didn't look for him at all; is that correct?

A That's correct.

Q Apart from the law enforcement people, did you discuss with your father at all what you had seen?

A Yes.

Q And when for the first time did you discuss this with your father?

A The day after.

Q And did you and your father think that this was relevant for -- to an investigation of the fire?

A I thought it was relevant.

Q And did your father concur in your thought?

A If he did he didn't say.

Q But did you tell him that you thought it was

to him characterizing it.

Q There was a complaint about a fire, is that correct?

A Yes.

THE COURT: I will grant your motion.

MR. ADELMAN: Thank you.

Q Were you placed in charge of that investigation?

A I was.

Q Would you tell us what you did on April 22, 1972 after you received that complaint?

A I went to the place of occurrence about 9:00 a.m. in the morning.

Q Where did you go at that time?

A 351 Hilton Avenue.

(Continued next page.)

BY MR. DE PETRIS:

Q And as part of your investigation, did you have occasion to conduct an investigation of the premises 351 Milton Avenue?

A Yes, I did.

Q Tell us what you observed at that time?

A The house was a duplex house, two-family, and the No. 351 was badly damaged by a fire.

I looked the house over. I looked at the doors and so forth. They have a common-type lock on the doors which is known as a snap lock which can easily be opened with a piece of cellophane --

MR. AGULNICK: Objection, your Honor.

He was asked what he did. he wasn't asked to volunteer things about the snap lock on the door.

MR. DE PETRIS: I will ask a foundation question.

Q You observed a snap lock on the door on that occasion?

A Yes, I did.

Q Which door was that?

A The front door.

Q Are you familiar with how a snap lock can

be opened?

A Yes, I am.

Q And how are you familiar with that -- based on what experience?

A Based on numerous burglary experiences.

Q And can you tell the Jury how a snap lock can be opened?

A A snap lock can generally be opened by either a piece of stiff cellophone or thin piece of metal and it is pushed in behind the lock and the lock is pushed open and the door is open.

Q Does the leave generally visible signs of entry?

A No.

MR. AGULNICK: A short voir dire?

VOIR DIRE EXAMINATION

BY MR. AGULNICK:

Q Did you find any signs whatever that this snap lock was forced open --

THE COURT: I think you are indulging in cross-examination.

MR. AGULNICK: That was the only question and I was going to ask to strike his testimony, but I will reserve.

DIRECT EXAMINATION

BY MR. DE PETRIS (Cont'd):

Q You're familiar with this as a policeman?

A Yes.

Q Where was most of the fire damage that you observed?

A In the rear kitchen of the first floor.

The second floor was also damaged which is the bedroom and bathroom.

The damage to the kitchen was extensive. It was well littered. There was stuff on the kitchen floor which was thrown into the backyard which the firemen, I presume, did.

It was heavy fire damage.

Q Did you say there was a lot of debris around?

A Debris and litter from the firemen tearing the walls open and so forth.

Q Where was that debris?

A In the kitchen area and also in the backyard.

Q Did you have occasion to discover anything amongst the debris?

A Yes.

On the kitchen floor I found a quart size can about the size commonly used to start charcoal fires.

In the rear yard next to the rear steps, I also found another quart size can similar to the first can I found on the kitchen floor.

Q You found these amongst the debris; is that correct?

A That's correct.

Q Would you tell us the condition of these cans?

A They were badly charred and burned and full of residue and water and so forth from the fire hoses.

Q What was done with the cans?

A The cans were forwarded to our police laboratory for analysis.

Q And was an analysis made on the cans?

A Yes, it was.

Q What was the result of that analysis?

A The results were negative.

Q What do you mean by negative?

A They couldn't find what was in the cans because of the burned condition and the water and so forth that was in the cans.

MR. AGULNICK: I move to strike out the last part of the answer.

THE COURT: Come up for a moment.

(The following occurred at side bar.)

THE COURT: Read me the last part of the answer.

(Record read.)

MR. AGULNICK: I move to strike the entire answer. It is calling for testimony --

THE COURT: Did I hear incorrectly? You want to strike that?

MR. DE PETRIS: I brought this out not to mislead the Jury --

MR. AGULNICK: No, no. He's giving an explanation why there was no tangible and I am bringing that chemist who will give the scientific nonexistence of this material. He's giving a speculation.

THE COURT: Well, all right.

MR. AGULNICK: That's my point. I want you to understand.

THE COURT: All right.

MR. GOZEL: The reference that it's the kind of can commonly used for barbecue fluid. That's without foundation -- commonly used to start a charcoal fire.

There is no basis for that. I think it

was thrown in gratuitously.

MR. DE PETRIS: He was describing the can.

MR. GOZEL: Perhaps it could be used for fruit juice.

MR. DE PETRIS: But it is not.

MR. GOZEL: Why barbecue fires? There is an implication this gentelan is trying to get across without justification.

He has no idea what the can is for.

MR. DE PETRIS: You can cross-examine him on the can.

THE COURT: I think it would be permissible under the rules because he certainly is an expert and has had prior expertise on this point.

The way I see it, based on his expertise and experience, he can testify to that. I don't think I can preclude the Government from having someone with prior experience testifying to that.

Shoe stores and clothing stores go up in flames throughout New York City, and sometimes subsequent investigation reveals items that are suspicious.

I'd have to permit counsel to explore his experience. You want me to do that?

7 Corbett - direct

(The following occurred in open Court.)

BY MR. DE PETRIS:

Q Mr. Corbett, after you received the results of this report, what was done with the cans?

A The cans were sent back to the property clerk's office on Staten Island.

Q Where are those cans now?

A I understand they have been disposed of.

Q Pursuant to what procedure is that?

A Normal Police Department procedure.

Q What is the normal Police Department procedure in that regard?

A Well, there was a Grand Jury investigation on Staten Island and over a period of time -- and we ended up with no results on this case.

The case was closed for all purposes and I imagine they thendisposed of the cans.

Q I show you Government Exhibit 7 for Identification and ask you if you recognize what that photograph depicts?

A Yes, I do.

Q And what does it depict --

THE COURT: Wait a minute. It is not in evidence yes.

Is it something he recognizes? Is the object photographed something he recognizes?

MR. DE PETRIS: I think he already said: Yes.

THE COURT: I am not sure of that.

BY MR. DE PETRIS:

Q Is that something you recognize?

A Yes, I do.

Q Is that a fair and accurate representation of something you saw that day?

A Yes.

Q Is it a fair and accurate representation of the object in that photograph as you observed it on that day?

A Yes, it is.

Q Is that photograph taken in the exact location where you found the object or what?

A No. This is a can that was put on the front steps going upstairs inside the house and the photograph was taken of the can on the steps.

That's not where I found it.

MR. DE PETRIS: I would offer the exhibit in evidence.

THE COURT: Only for the can and not to show the place.

MR. DE PETRIS: Only for the can, not the location where it was found.

THE COURT: All right.

THE CLERK: Government Exhibit 7 received in evidence.

(So marked.)

MR. DE PETRIS: I would request permission to pass this to the Jury.

MR. AGULNICK: May I have a voir dire on the existence of the can and the destruction of the can or should I reserve for cross-examination?

THE COURT: I think actually you should reserve for cross.

(Exhibit passed to jurors.)

THE COURT: Let me just ask this question.

I think perhaps counsel has this in mind.

When you say you found the can some place else, you found it in the building or somewhere adjacent to the building?

THE WITNESS: Yes.

BY MR. DE PETRIS:

Q Tell us again where you found each of the two cans?

A I found one can on the kitchen floor and

the second can in the backyard next to the rear steps.

Q Now, Mr. Corbett, as part of your investigation, did you have occasion to interview one Anthony Vivelo?

A Yes, I did.

Q Do you recall approximately when it was that you interviewed Mr. Vivelo?

A It was the early part of May, 1972.

Q That would be shortly after the fire?

A Yes, it was.

Q And to the best of your recollection, where did you interview him?

A At the 122nd Stationhouse.

Q Who was present on that occasion?

A Just myself and Mr. Vivelo.

Q Did you have a conversation with him at that time?

A Yes, I did.

Q Would you tell us what you said to him and what he said to you at that time?

A At that time I spoke to Mr. Vivelo in the squad office of the 122nd Precinct and I asked him what his movements were on the night of the fire, April 22nd and he stated to me that he was the patrolman assigned

to the 60th Precinct in Brooklyn and on the 21st had worked a 4:00 to 12:00 tour.

Q 4:00 p.m. to midnight?

A Yes. He arrived home 12:25 to 12:30 and upon arrival at his house when he went to the door, he discovered he did not have a house key and he rang the doorbell but couldn't wake his wife up.

So he went across the street to Mr. Anzalone's house where he subsequently called his wife on the telephone. He had a cup of coffee with Mr. Anzalone and his wife, stayed there about 10 minutes, and then went home.

When he entered the house, he left his dog out for a few minutes. He took the dog to the front, saw no one on the street and let the dog take a run.

He went back in the house and two or three minutes, the dog returned.

He then went to bed. He said that was about 1:00 a.m. in the morning. He fell asleep and his wife awakened him and told him there was a fire outside.

He subsequently went out and saw the firemen and the neighbors out around that fire.

He then come back to his house and another neighbor Mr. Maddalone and his family stoppedover and

they had a cup of coffee at his residence and he subsequently went back to bed.

I asked him if he had any information as to who could have set the fire or damaged the houses there or attempted to keep the colored family from moving in and he said he had no information.

Q Now, when you were questioning him about his activities on the night of the fire and he told you about going over to Mr. Anzalone's house 12:25, 12:30, and then went back home and walked his dog and went to bed about 1:00 o'clock; did he say anything about going back to Mr. Anzalone's house that night approximately 12:30 or 1:30 that evening?

A No, he did not.

MR. DI PETRIS: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. AGULNICK:

Q Mr. Corbett, you say these pictures of these cans in these particular pictures were destroyed.

Do you know about when they were destroyed?

A I don't know.

Q Would it shock you, sir, if I told you they were destroyed in June of 1975, sir, while there was a

Federal Grand Jury investigation going on?

A I would have no idea. I was retired from the job at that time and I knew nothing about it.

Q I see.

As a matter of fact, sir, the can was destroyed on June 3 of 1975.

Does that ring a bell, sir?

A No, sir.

Q Now, sir, would it be correct to say that yourecovered these cans about 9:00 a.m. the morning after the fire?

A It would be after 9:00 a.m.; sometime that morning.

Q And would it be correct to say there was a can on the floor in the kitchen?

A That's correct.

Q And it was in open view?

A No. It was on the kitchen floor but there was a lot of rubbish and water on the floor and so forth --

Q I see --

MR. DE PETRIS: May the witness be permitted to finish?

MR. AGULNICK: Certainly.

Would you like to finish the answer for him?

THE WITNESS: There was rubbish on the floor like after the firemen tore down walls and so forth.

Q Were you informed that the foremen conducted a search of the area prior to your coming on the scene?

A No, I was not.

Q You were not informed or you didn't ascertain --

A There was no fireman on the scene at that time.

Q Where was the other can you found?

A In the backyard adjacent to the rear steps.

Q And it was outside actually --

A On the ground.

Q On the ground?

A Yes.

Q And as a matter of fact, these two cans that you found they had no markings whatsoever on them?

A Whatever markings were on them were destroyed by the fire.

Q Would you answer the question?

A Would you mind repeating it?

Q The question is simple enough. Look at the

photograph.

Did they have any markings on them without giving us your conclusions?

A No markings.

Q Thank you, sir.

As a matter of fact, sir, when you characterized the cans or tells what type of cans, this is a guess on your part; is that correct, sir?

A Yes, it is.

Q Thank you.

Now, Mr. DePetris asked you questions about a lock and about the possibility that the lock was forced open; is that correct, sir?

A He asked me about a lock, a common type lock, yes, sir.

Q Right.

Would you say you were speculating when you spoke about the lock and the opening of that lock in regard to this specific incident?

A Yes.

Q As a matter of fact, sir, you remember testifying in the Staten Island Grand Jury on Seprember 22nd of 1972, or thereabouts?

A Yes.

Q Do you remember one of the Grand jurors asking you this question and you giving this answer --

MR. AGULNICK: Page 23 --

Q --"Juror: In the course of the investigation was it determined how these people got into the house, how they gained entry?"

Do you remember being asked that question?

Let me read the answer. Perhaps together --

"Answer: Well, we couldn't determine during the investigation because there was no apparent break or entry into the house but there were numerous keys to the residence in that location.

"Friends of the Charles' had keys and the neighbor next door had keys which he lost. There were approximately 10 keys out for that particular house.

"Now, the house was locked that night only with a snap lock from what I understand and a snap lock is very easily opened. You put a piece of cellophane and you can open a snap lock without leaving any visible signs of forced entry.

"Most of the windows on the ground floor were boarded up."

Do you remember that question and answer?

A Yes.

Q So there could have been 10 different ways that house was gotten into or entry was made into?

A Yes.

Q Incidentally, did you have a conversation with a Leo Glaser, the neighbor next door?

A Yes, I did.

(Mr. DePetris rises.)

THE COURT: I think counsel suggests that you are going beyond the scope of cross-examination without stating it.

MR. AGULNICK: With all due respect, I don't understand that to be the law.

MR. DE PETRIS: May we have a side bar?

(The following occurred at side bar.)

MR. AGULNICK: I will adopt him as my own witness.

THE COURT: You didn't voice it but I gather that was your objection?

MR. DE PETRIS: Part of it.

I wanted an offer of proof. This may be hearsay.

THE COURT: What is this?

MR. DE PETRIS: I want an offer of proof. I don't know if it is hearsay or what. It is cer-

tainly beyond --

MR. AGULNICK: Now, I have to make an offer of proof?

MR. DE PETRIS: You are going beyond the scope --

THE COURT: Please lower your voices.

MR. AGULNICK: He's talking louder than I. I just look more intense.

I will call him as my own witness and we will keep him around for a couple of days.

I am going to ask him if Leo Glaser said he lost the keys.

MR. DE PETRIS: That's it?

MR. AGULNICK: What do you think I am going to ask him?

THE COURT: I will give a recess but don't get this way -- are you going to finish?

MR. AGULNICK: Before lunch, surely.

(The following occurred in open Court.)

MR. AGULNICK: May I ask the last question?

THE COURT: The reporter will read it.

(Record read.)

A Yes, I did.

Q Did he tell you he had lost his keys?

A I can't say positively but I think he did.

Q Did he tell you about when he had lost his keys?

A I don't recall.

Q Would the date December of '71 refresh your recollection?

A I don't know.

Q When I read that statement -- the question and answer to you before from the Staten Island Grand Jury, you made reference to the fact that the neighbors had keys and the neighbor next door had keys and had lost them.

A That's right.

Q By that you were referring to Leo Glaser?

A That's right.

MR. AGULNICK: I would ask for a short recess at this point.

THE COURT: All right, let's take a 10-minute break.

(Recess taken.)

(Continued on next page.)

A:CR
4AMall

RICHARD CORBETT, having been previously duly sworn resumed the stand and testified further as follows:

CROSS EXAMINATION

XXXXXXXXX

BY MR. AGULNICK:

Q Were you here -- did you see the last witness outside the hall, Robert Glaser?

A I met him in the witness room, yes.

Q Do you remember speaking to Robert Glaser sometime after the fire?

A Yes, I do.

Q And do you remember having a lengthy interview with Robert Glaser?

A Yes, I had an interview with him.

Q And did you take notes of that interview?

A I think I did, yes.

Q And did you prepare a report of that particular interview?

A Yes, I think a report was made.

Q And that would have been a report consisting of a number of paragraphs with regard to what he had told you; is that correct?

A I'd say so, yes.

MR. AGULNICK: Your Honor, at this time I would ask that that report be produced.

We don't have that report.

MR. DE PETRIS: You have every report that I have. Do you want to go to sidebar?

MR. AGULNICK: Yes.

(Discussion at the sidebar, out of the hearing of the jury.)

THE COURT: You say you don't have the report?

DE PETRIS: They have everything that I have, your Honor.

THE COURT: While you're here, ask your fellow counsel to come up here, a juror wants a question clarified before this witness leaves the stand.

So ask your fellow counsel to come up here.

I wanted to inform counsel that one of the jurors asked my clerk if she could -- I say she, he or she, could ask a question or questions to clarify some matter with this witness before the witness leaves the satnd.

Now, my normal procedure would be to supply the juror with a pad and pencil to write out whatever it is that is bothering him or her, and then I will consult with you, all of you.

Do you approve of that?

MR. CRECCA: I used to do that.

MR. DE PETRIS: It must be right then.

THE COURT: That shows that judicial minds run in the same rut.

MR. CRECCA: No, really.

MR. FLAMHAFT: Then you will --

MR. AGULNICK: Do you want to do it now before I complete? I could suspend now and get it done.

Maybe it's something that I should bring out.

THE COURT: What about this other thing? There is nothing, apparently, that can be done.

MR. AGULNICK: Can I ask him --

MR. GOCEL: What is the status of where these reports are?

MR. DE PETRIS: I don't have any report. The only thing I have is reference to a fire marshal report.

MR. AGULNICK: Let me ask him. Maybe he has no others.

MR. GOCEL: Then you will take care of the juror?

THE COURT: Yes.

(The following occurred within the hearing of

the jury.)

BY MR. AGULNICK:

Q I take it that before you prepared a written follow-up report you made your own notes of your interview with Mr. Glaser.

A Yes.

Q And are those notes now available?

A I have no idea where they are.

Q Well, would they be at the precinct which you were at?

A Not to my knowledge.

Q Have you checked that precinct?

A Yes, I did.

Q Have you checked your own personal files as to those notes?

A I have no personal files.

Q You mean you got rid of all --

A I destroyed them or closed them.

Q And have you made any inquiry as to the written report, that would be a DD-5?

A I didn't see any.

Q Is there any location at which you think that report might be at the present time?

A They should be filed away someplace.

***

AG:BD 1pm1

AFTERNOON SESSION

THE COURT: All right, bring in the jury.

(Jurors enter the courtroom and are now seated in the jury box.)

THE COURT: Good afternoon, members of the jury.

ANTHONY ROMERO, having been first duly sworn by the Clerk of the Court, took the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. DE PETRIS:

Q Please state your name.

A Anthony Romero.

Q Mr. Romero, how old are you?

A 37.

Q By whom are you employed?

A New York City Fire Department.

Q In what capacity?

A As a supervisor, fire marshal.

Q How long have you been so employed?

A 13 years.

Q What is your business address?

A 110 Church Street, Manhattan.

Q When did you finish your last tour of duty as a fire marshal?

MR. AGULNICK: Objection to the relevance of

he saw flames coming from the rear of the fire building.

"Question: That was 351?

"Answer: 351 Milton Avenue. I asked, 'Why didn't you tell the Fire Department where the fire was at this point?' He just said, 'I didn't want to get involved.'"

Were you asked those questions and did you give those answers?

A Yes, I did.

MR. AGULNICK: Your Honor, can Mr. DePetris finish the answer?

MR. DE PETRIS: It goes on to a different matter. I have no objection to finishing it.

Q "He did tell me later on that when the Fire Department did arrive he did go to the Fire Chief and he told him that he made the call. We learned from our investigation after speaking to the Fire Department Dispatcher and the telephone company a call was made from him. When we confronted him he did admit to making the calls, but he didn't want to identify himself at that point."

Q Do you recall being questioned yesterday by Mr. Agulnick concerning your opinion as to the cause or origin of the fire at various stages of the investigation?

RED:ald
F.#723,108

'NITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

ALBERT ANZALONE, ET AL.,

Defendants.

AFFIDAVIT

75 CR 751

- - - - - - - - - - - - - - - - - X

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

RONALD E. DePETRIS, being duly sworn, deposes and says:

1. I am a Deputy Chief of the Criminal Division in the Office of the United States Attorney for the Eastern District of New York. I make this affidavit in opposition to the omnibus pre-trial motions made by the defendants ALBERT ANZALONE and ANTHONY VIVELO in the above-captioned case.

SEVERANCE

2. The defendants ANZALONE and VIVELO have moved for a severance on the ground that, upon information and belief, certain admissions made by one or more of the other defendants will be used against the defendants ANZALONE and VIVELO in violation of Bruton v. United States, 391 U.S. 123 (1968).

3. Rule 14 of the Federal Rules of Criminal Procedure sets forth a procedure for resolving such issues -- submission to the court for inspection of any statements raising a Bruton problem which the government intends to introduce in evidence at the trial.

Upon such a submission, there are various alternatives open to the court. First, the court may determine that the co-defendant's statement is not prejudicial to the defendant.

Second, the court may be able to prevent prejudice by deleting portions of the statement. Third, the government may agree not to introduce the statement at trial. Finally, only as a last resort in the event that no other alternative will prevent prejudice, the court should grant a severance. See Wright, Federal Practice and Procedure, §224, at pp. 456-458.

4. In support of their motions the defendants ANZALONE and VIVELO point to excerpts from various post-conspiracy statements made by the co-defendant Barbieri, admission of which it is contended would violate Bruton. Resolution of this problem as to the defendant ANZALONE is simple. The government does not intend to introduce in evidence any of the post-conspiracy statements implicating the defendant ANZALONE made by the co-defendant Barbieri. However, if the co-defendant Barbieri takes the stand in his own defense, he of course is subject to cross-examination by the government and the co-defendants; in this situation questioning concerning the above-mentioned statements would not constitute a denial of the right to confrontation and would not raise any Bruton problem. See Nelson v. O'Neil, 402 U.S. 622 (1971).

Likewise the government does not intend to introduce in evidence any of the statements implicating the defendant VIVELO made by the co-defendant Barbieri which are referred to on p.3 of the affirmation submitted in support of the defendant VIVELO's motion.

5. The government does intend to introduce in evidence testimony by Fire Marshalls Anthony Romero and George Felton concerning portions of a conversation which they had with the co-defendant Barbieri. The conversation in part implicates the defendant VIVELO

(see p. 2 of the affirmation submitted in support of the defendant VIVELO's motion).

However, the government intends to omit from this evidence any mention of the name of the defendant VIVELO. A copy of the grand jury testimony of Romero and Felton, together with a copy of Barbieri's grand jury testimony (see pp. 49-50, 51 for questioning of Barbieri in this regard) will be submitted separately to the court (defense counsel have previously received copies of this testimony). With the excision of the defendant VIVELO's name, the testimony of the fire marshalls will be to the effect that Barbieri told them that (1) a group of people in the neighborhood solicited money for a down payment to purchase the house located at 351 Milton Avenue, Staten Island, New York and thereby prevent the black family from moving in, and (2) specifically, Tortora and another individual [excision of VIVELO's name] were among the persons who participated in this solicitation.

This testimony will support Count Eight of the indictment charging Barbieri with making false declarations before the grand jury [note that the specific references to VIVELO's name in the questioning of Barbieri before the grand jury (pp. 49-50, 51) have been omitted in the grand jury testimony set forth in Count Eight]. At the same time it will in no way inculpate the defendant VIVELO, thereby avoiding any Bruton problem. See United States v. Wingate, 520 F.2d 309, 313-314 (2d Cir. 1975); United States v. Trudo, 449 F.2d 649, 652-653 (2d Cir. 1971), cert. denied, 405 U.S. 926 (1972); United States ex rel. Nelson v. Follette, 430 F.2d 1055, 1058 (2d Cir. 1970), cert. denied, 401 U.S. 917 (1971).

6. Accordingly, for the above-mentioned reasons, the motions for severance made by the defendants ANZALONE and VIVELO should be denied.

EXCULPATORY MATERIAL

7. The defendants ANZALONE and VIVELO have moved to be supplied with certain materials and information which they contend constitute Brady material. In this regard the defendants seek two categories of material.

8. First, the defendants seek various material and information relating to the unindicted co-conspirator, Gerald Maddalone. Any such information which the government has will be supplied at trial and as part of "3500" material. Brady does not require disclosure of such information prior to trial. United States v. Regan, 503 F.2d 1, 3 at fn. 1 (2d Cir. 1974), cert. denied, 420 U.S. 939 (1975); United States v. Scott, 524 F.2d 465, 467-468 (5th Cir. 1975).

9. Second, the defendants seek certain details relating to information which your deponent brought to their attention in a letter dated December 24, 1975, a copy of which is attached hereto as Exhibit A. Attached hereto as Exhibit B is a letter dated March 8, 1976 in which your deponent has responded to the instant requests for further information in this regard. Therefore, it would appear that the second request has been met satisfactorily. If there is anything further in this regard, it can be resolved on the return date of the motions.

GRAND JURY EVIDENCE

10. The defendants ANZALONE and VIVELO have moved for a dismissal of the indictment based upon allegedly improper grand jury questions.

11. Defendants overlook the fact that the function of this grand jury was an investigative one; indeed, the grand jury investigation in this case lasted approximately one year. In such a case not all questions need be, nor should they be, limited to seeking only answers which would be admissible at trial. See United States v. Calandra, 414 U.S. 338, 343-345 (1974). Moreover, an indictment is not subject to challenge on the ground that there was incompetent evidence before the grand jury. Costello v. United States, 350 U.S. 359, 363 (1956). Defendants' claim in this regard is utterly frivolous.

EVIDENCE AT TRIAL

12. Pursuant to Rule 12(d) of the Federal Rules of Criminal Procedure, your deponent has given notice to the defendants (see letter dated December 17, 1975, a copy of which is attached hereto as Exhibit C) of the government's intention to use certain specified evidence at trial, in order to afford the defendants an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of Rule 12. Failure to raise objections prior to trial constitutes a waiver thereof under Rule 12(f).

13. The defendants ANZALONE and VIVELO have moved to suppress two of the four items specified in said letter (items (2) and (3)). First, the defendants have moved to suppress as evidence the opinion of Fire Marshall Romero that the fire involved in this case was of an origin involving arson. A copy of the grand jury testimony of Fire Marshall Romero will be submitted separately to the court. Defense counsel have previously received copies of this testimony.

Rule 702 of the Federal Rules of Evidence sets forth the two criteria for the admission of expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Expert testimony concerning the nature, origin, or cause of a fire is admissible. Jones on Evidence, 6th Ed., §14.54, at p. 745. Romero has been employed as a fire marshall for twelve years.

Defendants' objection, however, does not appear to involve the two criteria set forth in the rule. Rather the ground for their motion is that "there is no basis in fact" for the fire marshall's conclusion. However, Romero's grand jury testimony indicates his personal observations made at the scene of the fire which provided the basis for his opinion (see pp. 9-11). The matters pointed to by defendants go to the weight, not the admissibility, of the expert opinion. See also Rule 705 of the Federal Rules of Evidence and Advisory Committee Notes thereto, indicating that the rule eliminates any requirement that underlying facts or data be disclosed prior to admission of the expert's opinion.

14. Second, the defendants ANZALONE and VIVELO object to the admission in evidence at trial of photographs depicting the house after the fire and photographs depicting a charred can found at the scene of the fire. The photographs will be produced for inspection by the court on the return date of the motions.

The first objection to these photographs -- that there is no indication of arson -- is obviated by the admission in evidence of the testimony of the fire marshall as discussed above. See also overt act 2 of Count One of the indictment. Defendants also object on the ground that the probative

value of the photographs depicting the house is outweighed by the prejudice. However, since the photographs depict the observations of the fire marshall which formed the basis for his opinion and are not prejudicial in any meaningful sense (as the Advisory Committee Notes indicate, unfair prejudice under Rule 403 of the Federal Rules of Evidence means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one"), these objections are without merit.

Likewise the photographs of the charred can are admissible. In the opinion of the fire marshall an inflammable liquid was used to start the fire (pp. 9-11 of his grand jury testimony). The photographs depict a charred can of the type normally used as a container for barbecue fluid, which was found at the scene of the fire (pp. 13-14, 9-10). Although no identifying marks were found on the can and a laboratory analysis was negative, these factors were explained by the fire marshall (pp. 10, 14). Under these circumstances a photograph of the can is surely relevant evidence within the meaning of Rule 401 (evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable ... than it would be without the evidence").

Defendants further object to the photographs of the charred can on the ground that the can was "wrongfully destroyed". However, the can was destroyed by the office of the police property clerk after the detective in charge of the police investigation reported that it was no longer needed. Since the can was destroyed in good faith, its destruction would not afford an objection to the admission of the photograph even if the best evidence rule, which seldom applies to photographs, were applicable. See Rule 1004(1),

and the Advisory Committee Notes to Rule 1002. Accordingly, defendants' motion in this regard should be denied.

SEARCHES AND SEIZURES

15. The defendants ANZALONE and VIVELO have moved for disclosure of information concerning searches and seizures. However, there were no searches and seizures in this case.

ELECTRONIC SURVEILLANCE

16. The defendants ANZALONE and VIVELO have moved for disclosure of information concerning wiretapping, electronic interception, and bugging. However, there were none in this case.

There is a tape recording of the anonymous (later determined to be Albert Anzalone and his wife) telephone conversations notifying the fire department of the fire at 351 Milton Avenue on the early morning of April 22, 1972. A copy of the transcript of that recording has previously been turned over to defense counsel. Defense counsel have also been previously advised that the tape recording itself is available for listening in my office.

IDENTIFICATION

17. The defendants have moved for disclosure of information concerning pre-trial identification procedure and events. However, there were no lineups, showings or viewing of photographs with respect to the defendants in this case.

STATE GRAND JURY TESTIMONY

18. The defendant ANZALONE has moved to dismiss the indictment based upon an alleged improper use of the immunized state grand jury testimony of the defendant ANZALONE. However, your deponent has not read this testimony.

Moreover, as will be shown below, the evidence in the forthcoming trial which implicates ANZALONE did not stem from ANZALONE's state grand jury testimony, and is derived from a legitimate source wholly independent of that testimony.

19. The defendant ANZALONE testified before the Richmond County grand jury on April 18, 1973, in which appearance he received transactional immunity from state prosecution. The state grand jury investigation had commenced on May 2, 1972. The defendant ANZALONE was the next to last witness who testified before that grand jury.

20. In June 1973 transcripts of the state grand jury testimony, including that of the defendant ANZALONE, were turned over to the United States Attorney's Office by the District Attorney's Office of Richmond County. Thereafter, in the summer 1973, an Assistant United States Attorney did review these transcripts, including that of the defendant ANZALONE, and prepared a memorandum to the file analyzing the facts and the law involved in the case, in which brief reference was made to portions of ANZALONE's testimony. This attorney did not commence any grand jury investigation in this case, and played no role in connection with the presentation of this case to the grand jury. Indeed, the attorney left the office in the spring 1974, several months prior to the commencement of the instant grand jury investigation. Your deponent has not discussed this case with that attorney.

21. In the meantime this office requested the Civil Rights Division of the Department of Justice to review the matter, which then requested the Federal

Bureau of Investigation to conduct an investigation in this case. Agent Vincent Savadel, the FBI case agent in this matter, conducted such an investigation. In this regard Agent Savadel did review the transcripts of the state grand jury testimony, including that of the defendant ANZALONE. According to Agent Savadel, the testimony of ANZALONE played no role in, and provided no leads in, his investigation. If deemed necessary by the court, Agent Savadel is prepared to so testify at an evidentiary hearing. Indeed, Agent Savadel has advised me that the testimony of ANZALONE was essentially worthless. Other than this statement, your deponent has not discussed the contents of ANZALONE's testimony with Agent Savadel.

22. After the completion of the FBI investigation in the spring 1974, the case was reviewed by another Assistant United States Attorney. In this regard a law school student in this office's clinical program did review the transcripts of the state grand jury testimony, including that of the defendant ANZALONE. The student wrote a memorandum to the Assistant United States Attorney, in which brief references were made to portions of ANZALONE's testimony. Your deponent has not discussed this case with the student. Thereafter, the Assistant United States Attorney recommended to the United States Attorney that a grand jury investigation be conducted.

23. On August 19, 1974 the instant case was assigned to your deponent by the United States Attorney. Thereafter, I conducted an exhaustive review of the matter and recommended that a grand jury investigation be conducted. After obtaining the requisite authorization from the Civil Rights Division of the Department of Justice, I commenced the grand jury investigation with the presentation of the

first witness on November 12, 1974. The lengthy grand jury investigation culminated in an indictment handed up on October 14, 1975.

24. At the outset of my involvement with this case I did make a brief review of the two memoranda referred to above in paragraphs 20 and 22. However, as is my practice, I did not rely on these memoranda prepared by others, but rather made an exhaustive review of the reports of the FBI investigation, the transcripts of the state grand jury testimony (other than ANZALONE's), and the reports made by the Bureau of Fire Investigation and the New York City Police Department. I made extensive notes during the course of my review of these materials. I specifically did not read the state grand jury testimony of ANZALONE, in order to avoid any problem of taint. I can state beyond any reasonable doubt that the brief references to ANZALONE's testimony in the above-mentioned memoranda were not the sources of any leads to the evidence in this case. Rather the steps I took in this investigation were based on the extensive notes referred to above, and leads developed therefrom.

25. In September 1974 Seth Kaufman, a law student in this office's clinical program (not the student referred to in paragraph 22), was assigned to work with me. In this regard he assisted me in connection with the instant case. Among other matters he reviewed the relevant materials, did legal research, and drafted questions for use by me in the presentation of witnesses to the grand jury. During the course of his initial review of materials in this case Mr. Kaufman did read the transcripts of the state grand jury testimony, including that of ANZALONE. When I learned that he had read ANZALONE's testimony, I instructed him not

to use it in connection with his duties in this case. According to Mr. Kaufman, the testimony of ANZALONE played no role in his duties in connection with this case. If deemed necessary by the court, Mr. Kaufman is prepared to so testify at an evidentiary hearing. Indeed, Mr. Kaufman has advised me that the testimony of ANZALONE was essentially worthless. Other than this statement, I have not discussed the contents of ANZALONE's testimony with Mr. Kaufman.

26. In preparation for this affidavit, I have made a careful review of the evidence implicating ANZALONE in the forthcoming trial, and the sources and leads which resulted in our obtaining that evidence. After this careful review, I am satisfied beyond any reasonable doubt that this evidence did not stem from ANZALONE's state grand jury testimony, and is derived from a legitimate source wholly independent of that testimony. If deemed necessary by the court, I am prepared to substantiate this statement at an evidentiary hearing.

27. The constitutional privilege against self-incrimination protects a witness testifying in a state proceeding under a grant of immunity against self-incrimination under federal as well as state law. The federal government is prohibited from using the testimony itself, as well as evidence derived directly or indirectly therefrom. Murphy v. Waterfront Com'n, 378 U.S. 52, 77-79 (1964). See also Kastigar v. United States, 406 U.S. 441, 453-462 (1972).

28. The defendant ANZALONE, alleging that his immunized testimony has been and will be used to pursue the instant prosecution, has moved to dismiss the indictment. However, even assuming the allegations were true, defendant has misconceived his remedy. The appropriate

remedy is the application of the exclusionary rule to any tainted evidence. Murphy v. Waterfront Com'n, supra, 378 U.S. at 79. See also Kastigar v. United States, supra, 406 U.S. at 459-462. Dismissal of the indictment is not a proper remedy, even if evidence obtained in violation of the privilege was presented to the grand jury. United States v. Calandra, 414 U.S. 338, 345 (1974).

29. This leaves for consideration the question of the application of the exclusionary rule to the evidence which will be used at trial in this case. The burden is on the government to establish that any disputed evidence it proposes to use at trial is derived from a source wholly independent of the immunized testimony. See Kastigar v. United States, supra, 406 U.S. at 460; Murphy v. Waterfront Com'n, supra, 378 U.S. at 79, n.18. The fact that the federal government had access to the immunized state grand jury testimony does not ipso facto prevent the government from carrying its burden in this regard. United States v. Catalano, 491 F.2d 268, 272 (2d Cir. 1974), cert denied, 419 U.S. 825 (1974). Its burden is to establish an independent source by a preponderance of the evidence. United States v. Seiffert, 501 F.2d 974, 982 (5th Cir. 1974).

30. There are basically four alternative procedures which the court may follow in determining whether or not the government's evidence is tainted. The court may (1) hold a pre-trial evidentiary hearing; (2) hold a taint hearing during trial as disputed evidence is offered; (3) hold a post-trial hearing; or (4) use a combination of these alternatives. United States v. DeDiego, 511 F.2d 818, 823-824 (D.C. Cir. 1975). We would suggest that the critical factor in deciding which of these alternatives to

use should be whether or not there is a substantial likelihood that tainted evidence will be used at the trial. If defendant makes a substantial showing that tainted evidence will be used, then perhaps a pre-trial hearing is advisable. If no such showing is made, then a full-scale suppression hearing prior to trial is not warranted; the question of an independent source would then be best resolved at a post-trial hearing, when all the trial evidence will have been placed on the record. See United States v. First Western State Bank of Minot, N.D., 491 F.2d 780, 787 (8th Cir. 1974), cert. denied, 419 U.S. 825 (1974).

31. The defendant has failed to make any substantial showing that tainted evidence will be used against him at trial. Further, your deponent has made a careful review of the sources of the evidence which implicates ANZALONE. Some of this evidence was derived from the transcripts of the state grand jury testimony of witnesses who testified prior to the date of ANZALONE's immunized testimony, which clearly presents no problem as to establishing an independent source. My review shows that of the witnesses implicating ANZALONE, there are only three whose evidence is derived from a source which post-dates the defendant's immunized testimony. As to these three witnesses, the source of the evidence consists of an FBI report of an interview with one witness, and my own interviews of the other two witnesses which developed from FBI interviews of other persons. None of these interviews was in any way derived from defendant's immunized testimony. Accordingly, I would suggest that the issue of an independent source is best resolved in a post-trial evidentiary hearing.

32. Moreover, there is an additional factor which suggests that there is no substantial question herein of an independent source, and that the matter is best resolved at a post-trial hearing. The defendant ANZALONE was interviewed shortly after the fire by fire marshall Romero and by police detective Corbett, which interviews predate defendant's immunized state grand jury testimony. Defendant's federal grand jury testimony post-dates the immunized state grand jury testimony. On each of these occasions the defendant ANZALONE's statements are essentially the same and are not incriminatory. I would suspect that the defendant's immunized state grand jury testimony is also essentially the same as the above-mentioned statements and not incriminatory. If such be the case, then surely there is no substantial likelihood of tainted evidence in this case. See United States v. Catalano, supra, 491 F.2d at 272 (circumspect immunized testimony).

Indeed, if such be the case, there is another critical factor which emerges. The government's evidence at trial will establish that defendant's non-incriminatory statements referred to above are false. The constitutional privilege was intended to protect the "incriminatory truth" from use by the government in a criminal prosecution. If under a grant of immunity a witness gives false testimony rather than the incriminatory truth, the testimony is not compelled and falls outside the constitutional privilege. United States v. Tramunti, 500 F.2d 1334, 1342-1346 (2d Cir. 1974), cert. denied, 419 U.S. 1079 (1974). If ANZALONE's state grand jury testimony is essentially the same as the statements in the police and fire marshall interviews and in his federal grand jury testimony -- that is, false and not

incriminatory, there is no prohibition against its use by the federal government.

Accordingly, your deponent will submit separately copies of these statements for inspection by the court. Defense counsel have already received such copies.

33. For the above reasons, the defendant ANZALONE's pre-trial motion should be denied. The issue of tainted evidence can best be resolved at a post-trial hearing on a motion under Rule 33 of the Federal Rules of Criminal Procedure.

_____

Sworn to before me this
day of March 1976

_____

TPP:RLD:ljl
F. #723,108

December 24, 1975

Barry W. Agulnick, Esq.
Corso, Agulnick & Gogel
32 Court Street
Brooklyn, New York 11201

Re: United States v. Albert Anzalone
Criminal Docket No. 75 CR 751

Dear Mr. Agulnick:

In response to your request for Brady material, I indicated in my letter of December 17, 1975 that I was not aware of any exculpatory material, but that I was in the process of reviewing our files and would shortly advise you if there was anything that would arguably constitute such Brady material.

I have now completed that review, and am still not aware of any exculpatory material (of course, any prior statements, inconsistent or otherwise, made by government witnesses and any promises made to government witnesses will be brought to your attention at the appropriate time at the beginning of or during trial). However, out of an abundance of caution, there is certain information which I will now bring to your attention. Whether or not it is useful or helpful to the defense I leave to your judgment.

The first item relates to overt act "4" of Count One of the indictment. On or about April 10, 1972 many of the persons living in the area of Hilton Avenue, including the defendants and the co-conspirator, participated in an effort to raise money for a down payment so that a white family could purchase the house located at 351 Hilton Avenue, Staten Island, New York. Each defendant has been identified by one or more persons as having participated in this effort. The "3500" material of these witnesses will be made available at the appropriate time. However, there are other persons who admitted participating in or having knowledge of this

effort, but who did not identify any of the defendants as also having participated. While these witnesses either did not know the defendants or did not recall whether or not the defendants participated, at the same time none of these witnesses stated that the defendants did not participate. The names and last known addresses of these persons will be made available upon appropriate request.

Secondly, there were several leads in connection with the investigation in this case which the state authorities pursued, and which either proved to be false or a dead end. These leads and their results are set forth below:

(a) A fourteen year old student at St. Francis School on Staten Island told a teacher in a flippant manner that he had set the fire at 351 Milton Avenue. Upon questioning by the authorities, the student stated that he had not set the fire and that he was joking or kidding around with the teacher. Thus this lead proved to be a false one. However, the name and last known address of the teacher and the student will be made available upon appropriate request.

(b) A person who lived in the area near Milton Avenue and who was helping the Charles family through the Catholic Interracial Council had a conversation with an employee who also lived near Milton Avenue. When the employer told the employee that he was meeting with the Charles family, the employee thought he was kidding and jokingly told the employer that he (the employee) had poured cement in the pipe lines at 351 Milton Avenue, broke fixtures with sledge hammers, and threw paint over all the walls. Thereafter the employer checked the house, found that while the house had been flooded, the vandalism described by the employer had not occurred and realized that the employee was joking. Upon questioning, the employee told the employer and later the authorities that he had been joking. Thus this lead also proved to be a false one. However, the names and last known addresses of these persons will be made available upon appropriate request.

(c) On the evening of Friday, April 21, 1972, the police received an anonymous call that the house at 351 Milton Avenue was going to be burned "tonight". The state authorities were able to trace the origin of this call. On the morning of April 21, 1972 a resident of Staten Island drove her child to Public School 50 in Oakwood, Staten Island. At the school she overheard a group of women talking, and one of them said something to the effect that "they're even thinking about burning it down". Later she told a member of the Staten Island

Catholic Interracial Council about the incident. This member then called another member and said that she heard that "they are going to burn the house on Milton Avenue tonight" (apparently unconsciously adding the word tonight). This latter member then called a third member of the council, and repeated the information. This third member then called the police and said, "This is a concerned citizen. They are going to burn 351 Milton Avenue tonight." He did not give his name, because the local newspaper had been publishing articles about the Charles family moving into 351 Milton Avenue and he did not want his name to appear in print.

The resident who overheard the women talking initially thought she recognized one of the women (through observation of the woman from the rear based upon the woman's voice, build and general appearance). However the woman denied being present at the school that morning, stating that her child rode the bus to school. The resident later indicated that she believes she was mistaken, that she believes the woman was someone unknown to her who resembled the woman she knew. Thus this lead proved to be a dead end. However, the names and last known addresses of these persons will be made available upon appropriate request.

(d) On April 9, 1972 an incident took place at the real estate company which owned the house at 351 Milton Avenue. A group of persons who lived in the area of Milton Avenue went to the real estate office to find out what was happening with respect to 351 Milton Avenue. A heated discussion took place between the group and the persons in the real estate office, and various threats were made. During the course of the discussion, one of the men mentioned something about a fire at the house. The exact words are not known, but were to the effect that either (1) we are aware of a group that would burn the house, (2) we can have the house burned down, or (3) we just stopped someone from burning the house.

The individual who made this statement has not been identified. A description of the individual was obtained. He was variously described as: (1) a big guy with black curly hair, and (2) a white male, 5'9" to 6'2" tall, 130-190 pounds, in late 20's or early 30's, sandy brown hair, light complexion, thin but solid build, either of Irish or Slovak extraction.

Thus this lead also proved to be a dead end. However, the names and last known addresses of those persons who heard the statement about burning the house will be made available upon appropriate request.

Very truly yours,

DAVID G. TRAGER
United States Attorney

By: RED
Ronald E. DePetris
Assistant U. S. Attorney

RED:sm
F. #723,108

March 3, 1976

Barry W. Agulnick, Esq.
Corso, Agulnick & Gogel
32 Court Street
Brooklyn, New York 11201

Re: United States v. Albert Anzalone
Docket No. 75 CR 751

Dear Mr. Agulnick:

Please refer to your omnibus pre-trial motion in the above-named case. I will shortly be filing an affidavit in opposition to various items of relief which you have sought therein. However, I believe your request for Brady material can be resolved informally by the information supplied below.

Your motion seeks disclosure of two categories of information which you contend constitute Brady material.

First, you seek various materials and information relating to the unindicted co-conspirator, Gerald Macdalone. Any such information which the Government has will be supplied at trial and as part of "3500" material. Brady does not require disclosure of such information prior to trial. United States v. Regan, 503 F.2d 1, 3 at fn. 1 (2d Cir. 1974), cert. denied, 420 U.S. 939 (1975); United States v. Scott, 524 F.2d 465, 467-468 (5th Cir. 1975). However, while some of your requests in this regard are phrased rather broadly and somewhat ambiguously, it would appear that the response to items (1), (2), and (4) in this regard would be "none".

Second, you have sought certain details relating to the information brought to your attention in my letter dated December 24, 1975. In that letter I indicated that

EXHIBIT B

the names and last known addresses of various persons would be made available upon appropriate request. The names and last known addresses of these various persons are provided below, with the numbering corresponding to that of the items in the letter as to which you have requested further information:

1. William Coppola, 795 Tysens Lane, Staten Island;
Arnold Frier, Box 222 Laurel Lane, Robertsville, New Jersey;
Gerard and Lorraine Frisone, 22 Malone Avenue, Staten Island;
John Liota, 393 Milton Avenue, Staten Island;
Edward Markowski, 132 Manila Avenue, Staten Island;
George Miller, 59 Tarring Street, Staten Island;
John Morreale, 367 Milton Avenue, Staten Island;
Frank Neufeld, 801 Tysens Lane, Staten Island.

2. (a) Joseph Lofton, 9 Penn Avenue, S.I.;
Janet Swizone, 173 York Avenue, S.I.

(b) Carl Bono, 86 Manila Avenue, S.I.;
Richard Guadagno, 72 Roberts Drive, S.I.

(c) Lillian Russo, 50 Roberts Drive, S.I.;
Ellen Zambardi, 720 Tysens Lane, S.I.;
Theresa Delaney, 209 Tysens Lane, S.I.;
Stanley Amilowski, 335 Adelaide Avenue, S.I.;
Frances Auriti, 103 Manila Avenue, S.I.

In addition, you have requested copies of all reports by law enforcement authorities relating to these incidents referred to in my letter of December 24, 1975.

However, the information set forth in the letter and the names and addresses provided herein fully comply with any Brady requirement, even if Brady were applicable to this information. Such internal Government documents made in connection with the investigation and prosecution of the case are not discoverable. See Rule 16(a)(2) of the Federal Rules of Criminal Procedure.

Under all the circumstances of this case it is in my view inappropriate to turn over these documents. However, I would be willing to make the reports available for inspection in my office at a mutually convenient time if there is sufficient reason to make such a request.

It would appear that your request for Brady material in the pre-trial motion has been met satisfactorily. If there is anything further in this regard, it can be resolved on the return date of the motion.

Very truly yours,

DAVID G. TRAGER
United States Attorney

By: _____
Ronald B. Belechis
Assistant U.S. Attorney

PP:RED:ljl
#723,108

December 17, 1975

Barry W. Agulnick, Esq.
Corso, Agulnick & Gogel
32 Court Street
Brooklyn, New York 11201

Re: United States v. Albert Anzalone
Docket No. 75 CR 751

Dear Mr. Agulnick:

Pursuant to Rule 12(d) of the Federal Rules of Criminal Procedure (effective December 1, 1975), I hereby give notice to the defendant of the government's intention to use certain specified evidence at trial, in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule. Failure to raise objections prior to trial constitutes a waiver thereof under Rule 12(f).

The above-mentioned evidence is specified as follows:

(1) a chart of the area of and near Milton Avenue, containing among other matters the house number of the houses in this area and the name of the occupant of the houses (this chart is available for inspection in my office at your convenience);

(2) testimony of fire marshall Anthony Romero that in his opinion as an expert the fire at 351 Milton Avenue was set -- that is, it was an arson (the substance of this evidence is set forth in his recorded testimony before the grand jury, a copy of which is being supplied as part of the discovery materials);

(3) photographs of the house at 351 Milton Avenue shortly after the fire, and photographs of a charred can of the type usually used to store a charcoal fire which had been found at the scene of the fire (these photographs are available for inspection in my office at your convenience); enclosed is a copy of the FBI interviews relevant thereto

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EXHIBIT C

of Detective Richard Corbett on December 10, 1973 and July 15, 1975, Police Officer Edward Atlak on July 15, 1975, Fire Marshall Anthony Romero on December 13, 1973, and Deputy Fire Chief Lawrence Surat on December 8, 1973; I understand that the police made an analysis of the can which was negative -- that is, it was unable to identify what the can had contained, apparently because the can had been badly burned and soaked with water; I have not seen and do not have a copy of that report); and

(4) the tape recording and transcript of the anonymous (later determined to be Albert Anzalone and his wife) telephone conversations notifying the fire department of the fire at 351 Milton Avenue on the early morning of April 22, 1972 (a copy of the transcript is being supplied as part of the discovery materials; the tape recording itself is available for listening in my office at your convenience).

Very truly yours,

DAVID G. TRAGER
United States Attorney

By: _____
Ronald E. DePetris
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

-against- :

ALBERT ANZALONE, :

Defendant. :

----------X

75-CR-751

United States Courthouse
Brooklyn, New York

June 15, 1976
4:00 p.m.

B e f o r e :

HONORABLE EDWARD R. NEAHER, U.S.D.J.

RAYMOND F. STALKER
ACTING OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: RONALD DE PETRIS, ESQ.
Assistant U.S. Attorney

BARRY AGULNICK, ESQ.
Attorney for Defendant

THE CLERK: United States of America v. Albert Anzalone.

THE COURT: Now I remember we're here for something, will you please refresh my recollection?

MR. DE PETRIS: If your Honor recalls, there's been a motion made prior to trial, pretrial motion with respect to the fact that Mr. Anzalone testified before the state grand jury under a grant of immunity and that the transcript of the state grand jury minutes have been in the possession of the federal government and certain persons, as pointed out in the affidavit, had read it. I myself had not and in light of the fact it had been pointed out in the affidavit which I presented to the Court, in that point of time there is no real likelihood it had any effect on the case and your Honor decided to deny at that time with relief to renew, post-trial if it was mooted by the verdict, which obviously it is not moot.

I understand Mr. Aqulnick does intend to continue to press this point. So, under the case law which was presented to your Honor at that time, the Government has the burden to establish affirmatively what the source of its evidence was. So, this necessitates a post-trial

hearing to show there was no taint.

Now I would ask your Honor to set a date for the hearing. There should be three or four short witnesses who will testify and we will have some documentary evidence adduced that might require a half a day for the hearing.

The reason we're here today is that Mr. John Scott, an attorney formerly with the Rackets Division (Civil Rights) may be going to Europe on an extended vacation or whatever, before he goes into private practice. He may be unavailable, so therefore I would ask your Honor to meet today so we could just for the purposes of presenting his testimony and have another date in which we will present the bulk of the evidence with respect to this question.

THE COURT: Then I suppose what we'd better do is get Mr. Scott on the stand without delay because I believe I have to leave at 4:30. I don't know how long it's going to take.

MR. DE PETRIS: Only a few minutes, your Honor.

THE COURT: Because I do have to attend a sentencing panel. I am the conferring judge, so I cannot shirk that --

MR. DE PETRIS: I don't think we will run past

4:30, shortly before 4:30.

THE COURT: Let's go.

JOHN RICHARD SCOTT, having been called as a witness on behalf of the Government, after having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DE PETRIS:

Q Mr. Scott, by whom are you currently employed?

A I am currently working for my father.

Q What was your prior employment?

A I was an attorney with the Civil Rights Division, Department of Justice.

Q During what period of time were you so employed?

A I was employed in January, 1970 and resigned, I believe, May 14, 1976.

Q And what were your duties with the Civil Rights Division?

A I was a trial attorney with the Education Section for three years and then as a trial attorney for the Criminal Section for three years.

Q And did there come a time you became involved in a case involving possible civil rights offenses against a black family who was moving into a house located at

351 Milton Avenue on Staten Island?

A That's correct.

Q And did there come a time as part of your duties in connection with that case when you reviewed certain material?

A That is correct.

Q Just briefly, how did it come about that you reviewed these materials?

A I believe the United States Attorney's Office forwarded certain materials to us, among them, FBI reports. Also I believe police reports and state grand jury transcripts, some time in the fall of 1973.

The Office at that time requested our advice and opinion as to the merits of that matter.

Q And as a result of that letter did you review these materials?

A Yes, I did.

Q And in that regard did you read all the state grand jury minutes that had been forwarded to you?

A All of it, that's correct, all of the state grand jury minutes.

Q As well as all the other material that had been forwarded?

A That's correct.

Q And did there come a time after reviewing those

materials in which you drafted a letter requesting the FBI to conduct an investigation?

A Yes, I did.

MR. DE PETRIS: May I have this marked as an exhibit?

THE COURT: Mark it Court Exhibit 1.

MR. DE PETRIS: Maybe hearing exhibit --

THE COURT: Do you happen to have a list?

MR. DE PETRIS: Hearing Exhibit 1.

THE CLERK: Two-page document dated November 5, 1973, marked Government Exhibit Hearing 1.

MR. DE PETRIS: I would offer this, if there is no objection?

MR. AGULNICK: I have no objection.

MR. DE PETRIS: I would offer this in evidence.

THE CLERK: Government's Hearing Exhibit 1, received in evidence.

THE COURT: Was this a letter requesting further investigation?

MR. DE PETRIS: Yes. This is the letter. I will have the witness identify it.

Q Mr. Scott, is this the letter which you drafted for Mr. Pottenger's approval requesting the FBI to conduct further investigations?

A Yes, that's correct.

Q Now, did the transcript of the state grand jury testimony of --

MR. DE PETRIS: Withdrawn.

May I have the document marked as Exhibit 2 in the hearing? It is the grand jury testimony, state grand jury testimony of Albert Anzalone. I believe it was in April of 1973.

THE CLERK: So marked.

MR. DE PETRIS: Any objection, Mr. Agulnick?

MR. AGULNICK: No objection.

THE CLERK: Marked Government's Hearing Exhibit 2 in evidence.

Q Mr. Scott, I ask you, is Government's Exhibit 2 in evidence the state grand jury testimony of Mr. Anzalone which you reviewed in the fall of '73?

A That's correct.

Q Now prior to today when I asked you again to review this grand jury testimony, did you have any recollection as to what -- whether or not there was anything useful in that testimony?

A Yes, I had a recollection that there was nothing of use in the grand jury testimony.

Q Did you review it at my request, the grand jury

testimony again today?

A I did, sir.

Q And does that re-confirm your opinion that there was nothing useful in the state grand jury testimony in connection with this federal investigation?

A That's correct.

Q Did that state grand jury testimony play any role in connection with your request to the FBI that they conduct a further investigation?

A The state grand jury testimony played no role in my request to the FBI.

Q Did it provide any leads in connection with any investigation?

A No. It provided no leads whatsoever.

MR. DE PETRIS: May I have this document marked as Government's Exhibit 3.

THE CLERK: Government's Hearing Exhibit 3, marked for identification, 11-page report dated October 4, 1974.

Q Now, Mr. Scott, can you identify for us Government's Exhibit 3 for identification?

A Yes. Government's Exhibit 3 is a prosecutor's summary which I prepared for the Assistant Attorney General summarizing in part the facts of this matter.

Q Was that done in connection with the request by the United States Attorney's Office for the Eastern District of New York, that the grand jury investigation be authorized?

A That's correct.

Q Did you recommend that such grand jury investigation be authorized?

A I recommended that as a course of action to my superiors and they in turn acted upon that recommendation.

Q And did they approve it as far as this office was concerned?

A That's correct.

MR. DE PETRIS: I would offer this in evidence.

MR. AGULNICK: No objection.

THE COURT: Government's Hearing Exhibit 3, received in evidence.

Q Now, at the time or shortly before the time you prepared that prosecutor's summary, did you have occasion again to review the various materials and reports and grand jury testimony?

A I did, yes, I did.

Q And in particular did you review Government's Exhibit 2 again at that time?

A Yes, I did.

Q And is there a reference to anything contained

in the grand jury testimony in that report?

A Yes, there is.

Q On what page is that?

A Page 5 of the prosecutor's summary.

Q And would it be fair to state that sets forth the state grand jury testimony of Mr. Anzalone, in which he denies having any knowledge with respect to the shooting of the windows?

A That's correct.

(continued next page)

Q Now in connection with your decision to recommend a grand jury investigation, did the state grand jury testimony play any role or provide any reason in connection with that recommendation?

A The state grand jury testimony contained no useful information and provided no leads as far as -- as far as our consideration of this matter was concerned.

Q Did it provide any role in the decision to recommend a grand jury investigation?

A No, it did not.

Q As a matter of fact, Mr. Scott, at any time during the course of this federal investigation and prosecution, to your knowledge, did the state grand jury testimony of Mr. Anzalone provide any leads or contribute to any decision of the prosecutor?

A Mr. Anzalone's testimony was in the grand jury, before the state, was of no use either in leads or in considering any course of action.

MR. DE PETRIS: Your Honor, the only additional thing I would propose to do at this time is to offer in evidence the Fire Marshal's report and the police detective's report of their interview of Mr. Anzalone, which has been previously marked 3500 material and the state grand jury testimony of those officials summarizing

their reports.

The purpose of that is to show substantially all the information in the state grand jury testimony was already available.

THE COURT: When you say summarizing, you mean are these attached summaries of the grand jury testimony? These are the only --

MR. DE PETRIS: It is the state grand jury testimony in which Mr. O'Mara and Mr. Corbett testified as to their interview of Mr. Anzalone.

THE COURT: That is something about reports?

MR. DE PETRIS: Also they are reports of the interview.

THE COURT: Reports and testimony of both of them. Is that it?

MR. DE PETRIS: Right. These have been previously marked as 3500 material. I would offer them in evidence at this time.

MR. AGULNICK: Your Honor, the purpose for offering them is to show the information available from a source other than the state grand jury testimony?

MR. DE PETRIS: It is my purpose to show that the testimony, the testimony -- in the testimony there was no useful purpose and it is to show whatever

information was there, the Government already had from those other reports.

MR. AGULNICK: I am going to object to that.

THE COURT: Let me ask you one thing by way of clarification: Was this information available to Mr. Scott, this material was not part of the material that he would use?

MR. DE PETRIS: Some of it was, your Honor, and I will establish it. But it also had a broader connection.

THE COURT: I understand they have a broader purpose. But, is that part of the material that was sent down to start off by saying, reviewed materials in this case, the FBI reports, police reports, state grand jury transcript, all I'm asking is does he recognize any of that material or do you represent that material was included --

MR. DE PETRIS: Certainly the state grand jury testimony.

THE COURT: They were included the and the fire marshals and detectives' reports?

MR. DE PETRIS: I'm not sure whether or not they were. The reports were. Maybe I should ask the witness.

THE COURT: All right.

BY MR. DE PETRIS:

Q Mr. Scott, as part of your review of the materials that were sent down to you prior to having performed your duties in connection with Exhibit 1 and Exhibit 3 in evidence, did you review the state grand jury testimony of Mr. Corbett and Mr. O'Mara, concerning their interviews with Mr. Anzalone?

A That's correct. I reviewed all of the testimony by each of the witnesses before the state grand jury.

Q Do you have any specific recollection as to whether or not the police report and the fire department's report of the interviews of Mr. Anzalone were part of the materials?

A To the best of my recollection they were; at the same time I seem to recall there were some -- there were police reports and I may have interviewed other people. I wasn't sure if we had those reports.

So I consequently requested the FBI to obtain the police report and fire marshal reports. To the best of my recollection, those reports I also had at the time these grand jury transcripts were given to me.

Q But there's no question you did have at least the state grand jury testimony?

A No question about that.

MR. DE PETRIS: Government's Exhibit 4 is the state grand jury testimony of Detective Corbett, July 14, 1972.

Government's Exhibit 5 will be the state grand jury testimony of the fire marshal, O'Mara on July 14, 1972.

THE CLERK: So marked.

MR. DE PETRIS: Maybe we could have it marked as 4 and 4B and 5 and 5A, respectively, the reports. That is the reports of Corbett and O'Mara, respectively.

THE CLERK: In evidence.

THE COURT: How are you going to mark these?

MR. DE PETRIS: 4A will be Detective Corbett's report.

THE COURT: All right.

MR. DE PETRIS: 4B will be the Fire Marshal's report.

THE COURT: That would be 5A?

MR. DE PETRIS: Right. I have no further questions, your Honor.

THE COURT: Mr. Agulnick, will you have many questions of the witness? Go ahead, because I have to break off.

MR. AGULNICK: I probably have ten minutes' worth of questions.

THE COURT: I hate to ask you to wait, but I must be on time on this.

MR. AGULNICK: Then I will wait. I don't want to hold you up. How long do you think you will be?

THE COURT: Hopefully, conceivably by 5:00, 5:15.

MR. AGULNICK: Maybe I can ask some questions.

CROSS-EXAMINATION

BY MR. AGULNICK:

Q Mr. Scott, there came a time when certain materials were sent to you for inspection; is that correct?

A That's correct.

Q And it was your duty to read these materials and to offer advice to the United States Attorney's Office?

A It was -- on this matter, it was assigned to me in the Civil Division and I am in the Criminal Section of the Civil Rights Division. So I make the initial review of the papers that were sent.

Q And they were sent to you by the United States Attorney's Office of the Eastern District of New York?

A That's correct.

Q And you had occasion to review the grand jury testimony of Albert Anzalone; is that correct?

A Yes.

Q And was there any notation in the papers which were sent to you or in the letter that was sent to you with regard to the fact that Mr. Anzalone had made reference to a transaction and asked for immunity in the state grand jury?

A In a letter to me was there any notation?

Q Yes, was there any notation in regard to that fact?

A I think there may have been. I don't recall that Mr. Anzalone's name was specifically mentioned.

Q Was there any instructions to you specifically in regard to Anzalone's state grand jury testimony?

A No, none whatsoever.

Q And there --

A The instructions from the United States Attorney's Office?

Q Right, there was no limit, you could review all the items and you didn't have to review --

A He sent the transcript -- no -- I recall there were no instructions. It was not for him to instruct us as far as I could see.

Q And do you recollect upon reading Mr. Anzalone's testimony that he did receive a form of immunity?

A Yes.

Q And at that time -- and yet you went on to read the entire testimony?

A I did.

Q Is that correct? And have you had an opportunity to review that testimony within the last few days?

A I read it very quickly a few moments ago before I came down here.

Q I see. Do you recollect, as part of his grand jury testimony, Mr. Anzalone gave a certain account of a night in which there was a firebombing or a fire occurred at 351 Milton Avenue?

A Do I recollect his account from the transcript or from other information in the records?

Q I am asking from your recollection.

A From the transcript alone?

Q Yes.

A Yes, I did.

Q And you recall reading the grand jury testimony where he related a circumstance in which Mr. Bivio came to the house and had made certain requests, and do you recollect also a certain time sequence being mentioned in regard to the times that Mr. Bivio visited that house and what time Mr. Bivio finally left Anzalone's house?

A I remember Mr. Bivio going to Mr. Anzalone's house

as related in the transcript. I remember a discussion of the time periods.

Q Did you know that that was the night of the alleged fire?

A I believe that is correct.

Q And wouldn't you consider that that was pertinent information with regard to your evaluation of this case?

A The timing?

Q The sequence of events involving Mr. Bivlo and Anzalone.

A I think it would be relevant information.

Q Sure, and as a matter of fact, you received this total amount of information to review, you ascertained that Bivlo and Anzalone were possible targets of this investigation; is that correct?

A No, that is not correct.

(continued next page)

Q You didn't gather that from reading all the various police reports and other items?

MR. DE PETRIS: At what point in time?

Q When you received the initial material.

A No.

Q Do you understand my question?

A I think I do. Are you saying from the transcript?

Q No, from the total material that you received in bulk and that you reviewed, you gathered information to the effect Anzalone and Bivlo were possible perpetrators or possibly involved in these incidents?

A Well, I can answer it this way: I don't mean to be evasive, but when you say possible, if they were out there that night, I'm sure that it is, but I had no leads as far as they were concerned.

Q I ask you then again, the events of Anzalone and Bivlo as related by Anzalone in his grand jury testimony, were items which you considered pertinent to the investigation of a fire which happened shortly after, isn't that correct?

A Pertinent, yes.

Q There were certain items in the state grand jury minutes that you reviewed which were pertinent to the investigation?

A They were part of the investigation.

Q And as a matter of fact, I think in your prosecutor's summary you excerpt certain or at least one portion of Albert Anzalone's grand jury testimony; is that correct?

A That's correct.

Q Would you say that you prepared this excerpt because you felt that that particular item was pertinent to the investigation?

A No, not particularly.

Q -May I ask you, then, why you excerpted that particular portion?

A Well, the portion involving Anzalone came in -- implicating Anzalone came from another witness, Maddalone, who implicated Anzalone, and I believe they gathered in front of Anzalone's house or Bivlo's house. I don't recall which.

I simply recorded his denial of taking any part in any criminal activity, simply to balance the summary, just toshow the other side of the story.

Q I see, but you didn't also put it in there as a possible vehicle for the purpose of investigation with regard to Anzalone?

A No, I did not.

THE COURT: I am pushed for time.

MR. AGULNICK: I promise I will not be more than

five minutes more.

THE COURT: Make it three.

MR. AGULNICK: All right, Judge.

I'm almost finished. May I just have the prosecutor's summary? I feel like I'm on a race horse.

Q Now, sir, when you received the material from the United States Attorney's Office, do you recollect whether there were any synopses or any summaries of Anzalone's state grand jury testimony among that material?

A No, I do not.

Q So then, sir, I ask you one more time, in your reviewing the state grand jury testimony at the time you originally did it and in your review of the last few days, did you find any information which was pertinent to the cause of the fire and as to the possible perpetrator of this fire; is that correct?

A No, I don't believe so. I mean -- there are a number of witnesses that testified and if you're asking me whether the times they gave and where they were at the time and so forth was pertinent, I suppose they are pertinent.

MR. AGULNICK: I have no other questions at this time.

MR. DE PETRIS: Just one short matter, your Honor.

REDIRECT EXAMINATION

BY MR. DE PETRIS:

Q Mr. Scott, when you first reviewed these materials, I was not the Assistant United States Attorney assigned to it; correct?

A That's correct2

Q Did there come a time when I became the Assistant, did you ever discuss the contents of Anzalone's state grand jury testimony with me?

A No, I never did.

Q At least prior to the day after you reviewed it for this hearing --

MR. AGULNICK: I promise, your Honor, this is my last question.

RECROSS-EXAMINATION

BY MR. AGULNICK:

Q Did you ever prepare any summaries of Anzalone's grand jury testimony to be forwarded to any other officer, apart from the prosecutor's summary that we have here?

A No. There is no summary aside from what you have just indicated.

MR. AGULNICK: Thank you.

THE COURT: All right.

(Witness excused.)

MR. DE PETRIS: I would simply call to your Honor's attention in the grand jury testimony of Mr. Corbett and Mr. O'Mara, which has been offered into evidence, there is in there a reference to the time sequence on the night of the fire which was the subject of Mr. Anzalone's questioning of Mr. Scott.

RECROSS-EXAMINATION

BY MR. AGULNICK:

Q Mr. Scott, sir, didn't you feel you broke your promise, didn't you feel it was more pertinent to get information first hand under oath from an individual in regard to his activities on the evening rather than summaries which are second-hand information in a synopsis form? Wouldn't you feel that would be more useful?

A No. They came from the investigation and I put credence in the investigators.

THE COURT: Okay. I've got to run.

THE WITNESS: Thank you.

MR. DE PETRIS: Thank you, your Honor.

MR. AGULNICK: Thank you.

(Whereupon, the proceedings were concluded.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- : 75-CR-751

ALBERT ANZALONE, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

July 15, 1976
11:00 o'clock A.M.

B e f o r e :

HONORABLE EDWARD R. NEAHER, U.S.D.J.

ILENE GINSBERG
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: RONALD DE PETRIS
Assistant U.S. Attorney

BARRY ACULNICK, ESQ.
Attorney for Defendant

ig/ss
1pm1

MR. DE PETRIS: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. DE PETRIS: This afternoon, I would call Agent Savadel to the stand for a short examination somewhat similar to the examination of Mr. Scott.

Then, as I understand it, we will adjourn the rest of the hearing until -- well, we can set a date after --

THE COURT: All right.

V I N C E N T J. S A V A D E L, called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. DE PETRIS:

Q Would you please state your name for the record?

A Vincent J. Savadel, S-a-v-a-d-e-l.

Q Mr. Savadel, by whom are you employed?

A By the Federal Bureau of Investigation.

Q And in what capacity are you employed?

A As a special agent.

Q And how long have you been so employed?

A Twenty-four years.

Q And were you the case agent in the case of United States vs. Albert Anzalone, et al?

A Yes, sir, I was the second case agent, not the original case agent.

Q Do you recall when it was that you were assigned the case?

A Yes sir. In June of '73, June 30th, I believe.

Q What were your duties in connection with the case at that time?

A Well, actually I had no investigation to conduct immediately upon receiving the case. So that it was in a pending status although active investigation was being conducted at that time.

Q Were you monitoring the state investigation at that time?

A I would check with the police department and the District Attorney's Office to determine whether any progress was being made in their investigations.

Q Did there come a time when you were requested to conduct a thorough investigation in connection with this case?

A Yes, sir. I received instructions from the Civil Rights Division of the United States Department of Justice through the FBI headquarters to conduct an active investigation, receiving this communication in approximately the latter part of November of 1973.

Q Agent Savadel, I show you what has been marked

as Grand Jury -- I am sorry -- as Hearing Exhibit 1 in evidence.

I ask you whether or not that is a copy of the letter which you received requesting you to conduct the investigation?

A Yes sir. This is a copy of the letter.

MR. DE PETRIS: Your Honor, I would -- the copy that was marked as an exhibit last time was the U.S. Attorney's copy and there are a couple of scribbles, et cetera, in the margin which have no bearing to this case.

I asked Agent Savadel to bring me a clean copy of the report -- copy of the letter he had received and I have that letter and I would just request that we substitute the clean copy as Exhibit 1.

(Shown to defense counsel.)

MR. AGULNICK: I have no objection to the substitution, your Honor.

THE COURT: All right.

Q After receiving a copy of Government's Exhibit 1 in evidence, Agent Savadel, did you thereafter conduct an intensive investigation in this case?

A Yes, sir, I did.

Q And as part of that investigation, did you have

occasion in December of 1973 to interview Detective Corbett, the police detective who had conducted the state investigation?

A Yes, sir. I interviewed Detective Corbett sometime during December of 1973.

Q And thereafter, did you receive copies of any documentary exhibits?

A Yes sir, I did.

Q And was that the state grand jury minutes and the police and fire marshal reports of the state investigation?

A Yes sir. To the best of my recollection, I received copies of the Grand Jury testimony, New York City Fire Department and Police Department reports sometime in January of 1974.

Q And at that time, did you review those materials?

A I reviewed parts and sections of those materials but I don't believe I reviewed all of the material.

Q I direct your attention to Government Exhibit 2 in evidence, the State Grand Jury testimony of Albert Anzalone and I ask you whether or not you reviewed that exhibit as part of your investigation?

A Yes, sir. I reviewed this testimony of Mr. Anzalone but I can't honestly say when in point of time I reviewed it.

Q I show you Hearing Exhibit 4-A and 5-A in evidence which contain the police report and the fire marshal reports of the interviews, of their interviews of Albert Anzalone and I ask you whether or not you reviewed those materials as part of your investigation?

A I am trying to see if this pertains to Mr. Anzalone -- is his name on this?

Q Exhibit 4-A is the interview of Albert Anzalone by Police Detective Corbett.

A Yes, sir.

Q And Exhibit 5-A is the interview of Mr. Anzalone by Fire Marshal Romero.

A I reviewed both the police department report containing an interview with Albert Anzalone and a fire Marshal's report containing an interview of Albert Anzalone.

Q Was the State Grand Jury testimony of Mr. Anzalone of any value to your investigation?

A No sir, it was not.

Q Did it provide any leads for your investigation?

A No sir, it did not.

Q Did you use it in any way with respect to any decision you made with respect to the course of action you would take in your investigation?

A No sir. It had no influence on my investigation.

Q Prior to the time of the trial in this case, did you ever discuss the contents of the State Grand Jury testimony of Albert Anzalone with me?

A No sir, I never did.

Q I think we can probably all agree that Mr. Gerald Maddalone was probably the key witness in the Government's case against the defendants, including Mr. Anzalone.

MR. AGULNICK: I disagree. I really disagree.

MR. DE PETRIS: I'll rephrase the question.

MR. AGULNICK: I think Mrs. King was the key witness.

Q Agent Savadel, in your opinion, was Mr. Maddalone a key witness in the case against the defendants?

A Mr. Maddalone was the key witness in the case against the defendants.

Q Now, you interviewed him at what time; do you recall?

A Yes sir. I interviewed Mr. Maddalone in March of 1974. I believe perhaps March 6th, in and around that date.

Q That was when he made statements to you concerning his knowledge of the criminal activities to which he testified or most of which he testified to?

A It was during that interview that I obtained the information concerning the individuals in question.

Q Now, were you in any way -- withdrawn -- was your interview of Mr. Maddalone in any way a result of your having read the State Grand Jury testimony of Albert Anzalone?

A No sir, it was not.

MR. DE PETRIS: I have no further questions, your Honor.

Before Mr. Agulnick starts his cross-examination, may we just have the substitution of exhibits. That would be marked as Hearing Exhibit 1 in evidence.

CROSS-EXAMINATION

BY MR. AGULNICK:

Q Agent Savadel, you received a communication from, I believe it was the Civil Rights Division at some point?

A Yes sir, I received a communication in the latter part of November, 1973.

Q And there came a time when you were told to conduct an active investigation. Was that also in November of 1973?

A Yes, sir.

Q And part of the instructions which you received

was to go through the Grand Jury minutes of the state proceeding; is that correct?

A That is correct.

Q And one of the items which you deemed to be important, as far as going through the State Grand Jury testimony was concerned, was the testimony of various witnesses who might be potential targets, is that correct?

A That's difficult to answer, counselor.

I don't know that when I reviewed the Grand Jury minutes of any particular individual I had a preconceived idea as to the importance of these particular --

Q But in November of '73 you knew that Mr. Anzalone was one of the suspects -- from your monitoring of the state investigation?

A I imagine that he would have to be included among many possible suspects.

Q But he was one?

A I suppose that would be correct.

Q And you reviewed his testimony in the State Grand Jury?

A I did, yes, sir.

Q Had you received any instructions or information as to the fact that he had received immunity when he testified in the State Grand Jury?

A Perhaps -- I am not sure if it was in the newspaper or whether I was informed as a result of the first several lines of this testimony that he had received immunity. I am not certain.

Q I see.

And as a result of reading the first several lines where the prosecutor spoke about giving Mr. Anzalone immunity, you didn't stop at that point?

A No, because I had --

Q I am just asking if you had stopped --

A No I didn't stop.

Q You continued and read the entire Grand Jury testimony?

A Yes, umm-hmm.

Q And, incidently, before reading that Grand Jury testimony, had you received materials back from the Civil Rights Division?

A My best recollection is I received those instructions attached to an FBI communication.

Q Was there a packet of papers --

A No sir.

Q Nothing --

A Not to my recollection.

Q Did you ever at any point receive a synopsis

of Mr. Anzalone's Grand Jury testimony from any source?

A I honestly -- I don't think I did, sir, no.

Q Now, when you read Mr. Anzalone's Grand Jury minutes, isn't it a fact that a great deal of them had to do with his movements prior to the time of the fire, on the very night of the fire?

A Yes, sir.

I can recall certain segments of that testimony dealing with what transpired the night of the fire.

Q Right. And I assume a very important aspect of your investigation concerned the whereabouts and the activities of suspects on the night of the fire --

A Yes, sir, that would be true --

Q As it would with any good agent.

A Yes sir, that would be true.

Q And did you feel -- well, did you take any notes when you read Mr. Anzalone's Grand Jury testimony?

A I didn't take any notes when I read Mr. Anzalone's Grand Jury testimony, or anyone else's, sir.

Q Did you feel at the time that you read Mr. Anzalone's Grand Jury testimony that it was important to hear his own words as far as his movements on the night of the fire?

A I suppose that was in my mind, sir. I would

imagine so.

Q And you read about his movements on the night of the fire?

A If such is contained in the testimony, yes.

Q And after you read those Grand Jury minutes and other Grand Jury minutes, you continued your investigation and did other things pursuant to your investigation, is that correct?

A Yes, that is correct.

Q I assume one of the things you did was to follow up or find out about people and their whereabouts on the night of the fire?

A That would be one segment of my investigation.

Q I see.

And wouldn't you say now that it was important to your investigation to get Anzalone's whereabouts the night of the fire from his very own testimony under oath in the State Grand Jury?

A Important to my investigation?

Q Yes.

A I would say it would be.

Q Yes.

So then there were parts of Mr. Anzalone's testimony which you felt were relevant to your investigation

and in pursuing your search for the truth?

MR. DE PETRIS: There is a double question.

MR. AGULNICK: I didn't mean it that way.

MR. DE PETRIS: I object to the form.

MR. AGULNICK: I will withdraw the question and phrase it simply.

BY MR. AGULNICK:

Q So then you felt that it was --

MR. AGULNICK: I don't even remember what the question was.

THE COURT: We can have it read back.

(Record read.)

MR. AGULNICK: That is not a double question.

MR. DE PETRIS: Relevant to your investigation and pursuing --

Q So you felt there were portions of Mr. Anzalone's Grand Jury testimony which were relevant to pursuing your investigation?

A Not after I read the testimony, counselor.

Q Didn't we just talk about his movements that night being important, whether they indicate innocence or guilt?

A You will have to put that in the form of a question.

Q What I am saying is, your function as an FBI agent is to search for the truth and see who has committed crimes and who hasn't committed crimes --

A My function is to obtain investigative leads and after reading his testimony I found it indicated no investigative leads.

Q You mean if there was nothing as a positive aspect as far as finding other targets or indicating Mr. Anzalone to be a target -- is that what you are saying?

A Would you rephrase that, sir?

Q In other words, you are saying that from reading Mr. Anzalone's Grand Jury testimony you were not able to find anything which would positively lead you to his guilt?

A As a result of reading his testimony, I couldn't find anything which would directly lead to his guilt, no sir.

Q Did you feel there might be some leads in that Grand Jury testimony which you might pursue as to his innocence?

A I was reading it with an open mind. I would have to say yes to that.

Q Right. So then that Grand Jury testimony was important in your pursuit of this investigation?

A It was important only because I was directed to

review the Grand Jury minutes.

Q No. I understand that.

What I am asking you is, it was important to you in your quest for the truth about what happened on that date to get Mr. Anzalone's version from his own lips -- do you understand the question?

A I think I understand the question, counselor, and I hate to hesitate in answering your question. I read the Grand Jury testimony because I was requested to do so not knowing what would be in it or not be in it.

(Continued next page.)

Q I see.

A I frankly -- it would not have been one of my investigative techniques, but it was in the instructions and I doubt very much if I would have bothered reading it until perhaps the investigation was winding down. I certainly had other investigative leads to pursue.

Q Didn't you feel by reading his grand jury testimony you might be able to find other witnesses who might also be able to reconstruct that particular night of the fire and the movements of the various people that night?

MR. DE PETRIS: Is the question directed to prior or after reading?

MR. AGULNICK: After reading.

Q Do you understand what I am saying?

A Do you mind repeating it?

THE COURT: Read it back.

(Question read.)

MR. DE PETRIS: Your Honor, I have to object to the form of the question. It sounds like the question is being asked as to his state of mind before reading and then when I asked for him to be more specific, whether he is talking before or after, he said after. I would object to the form unless he is talking about before or after Agent Savadel read the minutes.

Q Maybe I can rephrase it.

There was a witness named Robert Glasser --

A Yes, sir.

Q -- who testified at the trial somewhat as to the movements of Mr. Vivelo on the night in question.

A Yes, sir.

Q Didn't you feel it was relevant in your sizing up the credibility of Robert Glasser to fit in his testimony with that of Mr. Anzalone?

A No, sir, not in that point of time.

Q Not at that point?

A Again, if you permit me to just explain it to you.

When I picked up any particular grand jury minutes, I had no idea at that point in time what I would find in there. I did not begin to read it saying to myself, "Perhaps I will find a lead as to another witness, perhaps I will find this."

It wasn't under those circumstances. I read the grand jury minutes just to see what this gentleman would have testified to.

Q You read them as a way of gathering information or possible information?

A Yes, I would say so.

Q Were you working at that time with the United States Attorney on the case?

A I suppose so.

Yes, there would have been an Assistant assigned to the case.

Q Do you recollect who the Assistant was at that time?

A The first assistant I worked with was Emanuel Moore.

Q Did you discuss with him the contents of Mr. Anzalone's state grand jury testimony?

A Not to my recollection, no.

Q Did he read the testimony, to your recollection?

A Not to my recollection.

Q And wouldn't you say, sir, that reviewing Mr. Anzalone's grand jury testimony under oath would be more valuable to you than reviewing police reports relating to Mr. Anzalone's statements and fire marshal reports relating to his statements?

A No, I can't attach that significance to it.

Q Even though it was under oath?

A Even though it was under oath.

MR. AGULNICK: I have no further questions.

MR. DE PETRIS: Nothing further, your Honor.

THE WITNESS: Thank you, your Honor.

THE COURT: Is there anything else?

MR. DE PETRIS: No, your Honor, not today.

This matter has been adjourned because of Mr. Agulnick; the only reason we took Agent Savadel today is because he is being transferred to Florida and leaving Tuesday morning.

THE COURT: I guess after twenty-four years he has earned it.

MR. AGULNICK: When will we continue this?

MR. DE PETRIS: The next subject at hand is when shall we have the rest of the hearing?

THE COURT: How many more witnesses do you have?

MR. DE PETRIS: One, maybe two and a statement I will have to make.

I do not know if Mr. Agulnick will want me to make it under oath, but I am prepared to. Also certain documentary exhibits will have to be offered.

THE COURT: How long do you expect to be on trial?

MR. AGULNICK: I will be finished on Monday, but hopefully I am going on vacation on Tuesday for a week.

THE COURT: You do not have to defend it.

MR. AGULNICK: I have been working --

THE COURT: The only thing I do call to your attention, that I have to go on vacation August 1st and I hope not to be seen around these parts.

MR. AGULNICK: I am sure we have about a hour's worth of testimony. May we do it some time the last week in July?

THE COURT: I do have a trial set for July 22nd.

MR. AGULNICK: If your Honor wants me to come in at four o'clock, I will..

THE COURT: What week will you be away?

MR. AGULNICK: I will leave Tuesday night --

THE COURT: The 20th?

MR. AGULNICK: Whatever next Tuesday's date is.

THE COURT: And you will be away for how long?

MR. AGULNICK: About a week.

THE COURT: So you will come back about the 28th or thereabouts?

MR. AGULNICK: Yes.

I have no objection in coming in late in the afternoon if you are going to be on trial.

THE COURT: You say you will be back when, the 28th?

MR. AGULNICK: I would imagine it would be the 28th.

MR. DE PETRIS: That is a Wednesday.

MR. AGULNICK: I will be ready to come to court on that date.

THE COURT: Let us say four o'clock on the 28th.

MR. DE PETRIS: I just call your Honor's attention to the fact that it may take a couple of hours. It is perfectly satisfactory to me.

MR. AGULNICK: It will be that long?

MR. DE PETRIS: The testimony won't, but my statement and the exhibits may take some time, because I plan on establishing for the record the source of every witness that I used.

THE COURT: Why don't you come into chambers and I will check on the date?

MR. DE PETRIS: I have no objection to doing that, but I wanted to call to your Honor's attention the length of time.

* * *

GREENBERG

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 29 day of Nov. ,19 76 at No. 225 Cadman Plaza East, Brooklyn, NY

deponent servied the within Appendix upon U.S. Atty., East. Dist. of NY

the Appellee herein, by delivering true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
29 day of Nov. 1976.

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978